United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

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United States Court of Appeals

FOR THE SECOND CIRCUIT

RESTAURANT ASSOCIATES INDUSTRIES, INC.,
Plaintiff-Appellant,

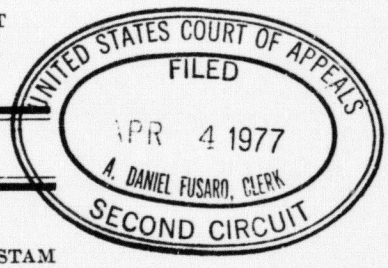
v.

ANHEUSER-BUSCH, INC.,
Defendant-Appellee,

and

SIDNEY SHERMAN and SHERMAN MANAGEMENT CORP. as additional defendants because they are or may be needed for an adjudication pursuant to FRCP 19.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



JOINT APPENDIX

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DOCKET ENTRIES

75 - 3018, POLLACK,J. RESTAURANT ASSOCIATES INDUSTRIES INC.VS. ANHEUSER-BUSCH,INC. 75 3018

DATE	NR.	PROCEEDINGS
06-23-75	(2)	Filed Complaint Issued Summons
06-23-75	(3)	Filed Affdvt of Personal Service of Summons & Complaint,by Laurence Kahn for pltff on deft. by attys Willkie,Farr & Gallagher on 6/20/75.
06-23-75	(4)	Filed Order to Show Cause&Temporary Restraining Order ret.7/8/75,10:00 A.M.Rm.1505. Pollack,J.
06-27-75	(5)	**Filed Undertaking on Injunction by pltff.in the sum of $10,000. Fidelity and Deposit Company of Maryland.**
07-03-75	(6)	Filed AMENDED COMPLAINT and issued summons.
7-09975.	(7)	Filed pltff. s pre-trial memo. of law.
7-09-75	(8)	Filed memo. of deft. Anheuser-Busch,Inc. in opposition topltff. s motion for preliminary injunction.
7-09-75	(9)	Filed memo. of pltff. Restaurant Associates Industries,Inc. in support of motion for preliminary injunction.
7-09-75		Filed memo-end. on order to show cause docketed 6-24-75 Preliminary injunction denied, following evidentiary hearing held on July 8 and 9 1975/ Findings made on stenographic record accordingly. Pollack,J. mm
7-08-75		Before Pollack,J. with Non-Jury.
7-08-75		Hearing on motion for preliminary injunction,
07-09-75		" contd and concluded.Judges Decision-Motion for preliminary injunction is denied;in all respects foregoing shall constitute Courts Findings of fact& conclusions of law as required by FRCP52(a)See stenographic minutes.
07-16-75	(10)	Filed Amended Summons with Marshal s Returns(Unserved: Sherman Management Corp.-unex. Sidney Sherman-Unex.
07-16-75	(11)	Filed Stip&Order extending time for deft.Anheuser-Busch ,Inc. to answer amended complaint to 7/21/75.Pollack,J.
7/15/75		Pre trial before Pollack J
07-23-75	(12)	Filed Stip&Order that zerox copy of pltff's Exhibit 13 in record of said hearing is substituted for pltff's exhibit #13 will be retd to Isaiah Zucker repr.of Sidney Sherman.Pollack,J
07-23-75	(13)	Filed Stip&Order extending time for deft.Anheuser-Busch,Inc. to answer amended complaint or Second Amended complaint to 9/10/75.Pollack,J.
09-10-75	(14)	Filed Deft.Anheuser-Busch,Inc. ANSWER to Amended Complaint. WF&G
9-19-75	(15)	Filed transcript of record of proceedings, dated 7-8-75 DM&M
10-07-75	(16)	Filed Pltffs Reply to Counterclaim.
3/4/76		Pre trial before Pollack J
6/3/76		Pre trial before Pollack J.
09-21-76	17	Non-Jury Trial begun 09-21-76 before Judge Pollack.
11-23-76	18	Filed transcript of record of proceedings, dated 9/21/76
11-23-76	19	(rcd from chambers)Filed Pltff's pre-trial Memorandum of Law.
11-23-76	20	" " " Filed Trial Memorandum of Deft.Anheuser-Busch Inc.
11-23-76	21	" " " Filed Pltff's pre-trial Order.
11-23-76	22	Filed OPINION#45389.Judgment is directed to be entered in favor of defts&against pltff,dismissing entire amended complaint with costs.Foregoing shall constitute findings of fact&conclusions of law required by FRCP,52(a).So Ordered.Pollack,J.
11-24-76	23	Filed JUDGMENT.Ordered that Defts.have judgment against pltff dismissing entire amended complaint with costs to be taxed.Clk. (mm)
12-23-76	24	Filed transcript of record of proceedings, dated 09-21-76
12-23-76	25	**Fld Pltff's notice of appeal from judgment entered 11/24/76. (mailed copy to Wilkie,Farr&Gallagher on 12/23/76)**
12-23-76	26	**Fld Bond Undertaking for costs on appeal in sum of $250.**
01-20-77	27	FLD Notice that orig record certified & transmitted to USCA

HEARING ON MOTION FOR PRELIMINARY INJUNCTION

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

RESTAURANT ASSOCIATES INDUSTRIES, INC.,

Plaintiff,

-against- 75 Civ. 3018

ANHEUSER-BUSCH, INC.,

Defendant.

----------x

Before:

HON. MILTON POLLACK,

District Judge

New York, New York
July 8, 1975 - 10 a.m.

APPEARANCES:

DORNBUSH, MENSCH, MANDELSTAM & SCHWARTZ, ESQS.
Attorneys for Plaintiff
By: MARTIN MENSCH, ESQ. and
RICHARD J. SCHAEFFER, ESQ., of Counsel

WILLKIE FARR & GALLAGHER, ESQS.
Attorneys for Defendant
By: HELMER R. JOHNSON, ESQ. and
ROBERT J. KHEEL, ESQ., of Counsel

Also Present:

ISAIAH O. ZUCKER, ESQ.,
Attorney for Sherman

(In open court.)

THE COURT: I think a brief opening statement might be useful here. I will hear from the moving party.

MR. MENSCH: Judge Pollack, my name is Martin Mensch. I am a member of Dornbush, Mensch, Mandelstam & Schwartz, attorneys for the plaintiff. With me is Richard J. Schaeffer.

The defendant, Anheuser-Busch, is represented by Willkie Farr & Gallagher. Seated behind me is Mr. Helmer Johnson and Mr. Robert Kheel.

I have, your Honor, two preliminary matters.

First, the plaintiff and the defendant Busch have entered into a statement of agreed facts and a stipulation with respect to the authenticity of documents which I would like to hand up to your Honor. It provides for it being so ordered by the Court.

THE COURT: This does not require a court order. This information may be utilized in lieu of an evidentiary showing and it may be offered in evidence after the commencement of the hearing.

What is your other point?

MR. MENSCH: I think it would be more useful if I made my opening statement because I have an application to add a party under Rule 21.

THE COURT: Did you talk to your adversaries about it?

MR. MENSCH: They know about it. I haven't asked for their consent yet.

THE COURT: Go ahead and ask them. Communication is an interesting thing. It's sometimes difficult but it's a useful device.

MR. KHEEL: Your Honor, last Thursday at about four o'clock --

THE COURT: You have a conversation between yourselves. There is no use in cluttering up the record with a lot of lawyer's talk. If you want to have a conversation with your adversary, Mr. Kheel, go ahead and talk to him about it and let me know whether you have an arrangement or you haven't.

MR. MENSCH: My adversary courteously stated that he would consent to the application.

THE COURT: Then there is no problem. What else have you got?

MR. MENSCH: We amended the Complaint to add the party and the relevance of our doing so will appear from the opening statement.

THE COURT: What party are you adding?

MR. MENSCH: If your Honor please, let me get to my

opening statement.

THE COURT: What party are you adding? Don't leave me hanging.

MR. MENSCH: I am sorry. An individual named Sidney Sherman and a corporation which we understand to be or to have been organized by him whose name is Sherman Management Corporation, Inc.

THE COURT: Those two names are referred to on this paper that you handed up. Are they going to be added as parties defendant?

MR. MENSCH: The Complaint is filed and they will be added as parties defendant although no relief is sought against them because we believe that they are or may be indispensable under Rule 19.

THE COURT: Are they represented in court?

MR. MENSCH: Mr. Sherman is present.

MR. ZUCKER: If the Court please, my name is Isaiah O. Zucker. Mr. Sherman, the party to which Mr. Mensch referred, was asked on June 24th to come into New York by a representative of Restaurant Associates. At his request he came into New York.

They discussed the matter. He was then taken to the attorneys for the plaintiff's office and there again examined for about three, four hours.

At that point in time, sir, he was not a party to this proceeding. After the conference in the plaintiff's attorneys' office he was served with a subpoena requiring him to appear here this morning. Needless to say, as a witness he had no objection of appearing in telling what he knows about the facts.

However, in view of the fact that counsel now for the plaintiff now seeks to make Mr. Sherman a party defendant, although he claims that he does not seek any affirmative relief against him, yet the very relief that he is seeking against Anheuser-Busch, to wit, to restrain them from doing business or from hiring Mr. Sherman, in reality is seeking also affirmative relief against Mr. Sherman because it may be depriving him of a job.

Under those circumstances, if the Court please, since I was only retained yesterday at about four o'clock in the afternoon, I respectfully ask to be given an opportunity to look into this matter, discuss it with Mr. Sherman and be able to determine what position to take.

THE COURT: You are not before the Court yet. There has been no process served on Mr. Sherman. I don't know what all this conversation is all about. I think we better get on with the trial or this will break down into a lot of colloquy. As far as I am concerned, Mr. Sherman

and Sherman Management Corporation are not before the Court.

MR. ZUCKER: Thank you.

THE COURT: Do you intend, Mr. Mensch, to present these agreed facts in evidence?

MR. MENSCH: Yes.

THE COURT: You offer them in evidence?

MR. MENSCH: Yes.

THE COURT: Is there any objection?

MR. KHEEL: There is also a stipulation --

THE COURT: Please.

MR. KHEEL: I don't know if the documents are meant to be put in evidence.

THE COURT: I am talking about the agreed facts.

MR. KHEEL: There is no objection to the agreed facts.

THE COURT: Those agreed facts are received in evidence and they will be detached from what follows.

The agreed facts are marked Plaintiff's Exhibit 1 in evidence.

xxx (Plaintiff's Exhibit 1 received in evidence.)

THE COURT: Do you have any witnesses, Mr. Mensch?

MR. MENSCH: Yes.

THE COURT: Call them.

MR. MENSCH: May I make an opening statement?

THE COURT: I don't think it's necessary. I am afraid it would break down into a lot of conversational matters.

MR. MENSCH: In any event, we expect before the end of the day to submit a trial memorandum to the Court.

THE COURT: That may be necessary and it may not be necessary. I don't place any premium on memoranda. Express yourself fully in the course of the trial. This is a provisional remedy that you are seeking here, and don't get the idea that you can become expansive and pull this thing out like a piece of taffy. You are either entitled to a provisional remedy or you are not. That doesn't mean that we will take all summer to find out.

Call your first witness.

R A L P H T O L V E, called as a witness by the plaintiff, being first duly sworn, testified as follows:

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. MENSCH:

Q Who is your employer?

A Restaurant Associates Industries, Inc.

Q What is the business of Restaurant Associates?

A We are in the full food management restaurant and recreational services business.

Q Do you have a title?

A Senior vice president, operations.

Q What are your duties?

A Profit and loss operational control of three segments of the company's business, specialty restaurant areas, the recreational services areas and the management fee service areas.

Q For convenience I will sometimes refer to Restaurant Associates as RA or Associates.

Are the operations of Restaurant Associates at Busch Gardens included in your corporate jurisdiction?

A Yes, sir.

Q What is the chain of command? Who is directly in charge of the operations at Restaurant Associates' operation at Busch Gardens?

A We have a recreational division vice president based in Miami responsible for the operations in the State of Florida and reporting to him is the general manager of operations at Busch Gardens for Restaurant Associates, Sidney Sherman.

Q Mr. Sherman, who is sitting in the courtroom?

A Yes, sir.

Q And Mr. Sherman, is he still in the employ of Restaurant Associates?

A Yes, sir.

Q When did Busch Gardens first come to your attention as an officer of Restaurant Associates?

A April of 1969.

Q How did that come about?

A Contact was made from St. Louis via the assistant to the then corporate vice president --

THE COURT: Mr. Mensch, you are not tending to prove a second time the matters stipulated in evidence, are you?

MR. MENSCH: I am going to take just a few moments to set the scene.

THE COURT: This all seems to be covered. What you are asking about now is covered in Exhibit 1.

MR. MENSCH: If your Honor will indulge me a few moments, you will see I don't intend to waste the Court's time.

THE COURT: Go ahead.

A Contact was made from a representative of Busch to our director of marketing at the time in April 1969.

Q What is it that Busch wanted from Restaurant Associates?

jqlm Tolve-direct 10

A We were retained to provide them the management skills necessary to operate a full service restaurant, fast food operations scattered throughout the Gardens and a public cafeteria.

Q Can you briefly describe Busch Gardens?

A Busch Gardens is the recreational theme park located in Tampa that provides recreational activities adjacent to the Anheuser-Busch brewery which includes aviary, a park, walk through areas, et cetera.

Q I show you a document and ask you to identify it. Would you describe what it is and --

A This is a fact sheet given to us by Anheuser-Busch at the time of the initial negotiations in 1969.

Q It's found in your files?

A Yes, sir.

Q It was given to you by Anheuser-Busch?

A Yes, sir.

Q It purports to be or it states it's a press fact sheet, Tampa Brewery and Busch Gardens Zoological Park.

MR. MENSCH: I should like to offer this document in evidence.

MR. KHEEL: I don't object to the authenticity. It seems irrelevant to me and I object on those grounds.

THE COURT: I think we better get down to what this

hearing is all about very quickly. I am waiting to see what the relevancy is of it. If there is no objection, we will receive it.

xxx (Plaintiff's Exhibit 2 received in evidence.)

Q Was Restaurant Associates the first food service company that operated at Busch Gardens?

A No, sir, we were the third.

Q And you succeeded another company?

A Yes.

Q Do you know why?

A Well, at the time of the negotiations we were given fact sheets and communications from Anheuser-Busch which indicated that there was a high degree of dissatisfaction with the food services at Busch Gardens.

Q I show you a document and ask you whether this is not what you received from Anheuser-Busch.

A Yes, sir.

MR. MENSCH: That is a report from an independent entity on the food service activities in Busch Gardens which was made just before Restaurant Associates took over those operations.

MR. KHEEL: Once again, your Honor, I object on the grounds of relevancy.

jqlm Tolve-direct 12

THE COURT: I will take it.'

xxx (Plaintiff's Exhibit 3 received in evidence.)

Q What happened as a result of the discussions of Restaurant Associates representatives with Anheuser-Busch's representatives?

A An agreement was concluded and we began operations on December 4, 1969.

MR. MENSCH: Your Honor, the authenticity of the agreement has been stipulated --

THE COURT: Would you please go ahead and stop being defensive about this. Hand your papers in and leave it to the other side to do the objecting.

MR. MENSCH: I am trying to obviate --

THE COURT: Please.

MR. KHEEL: Once again I object on relevance.

THE COURT: I am going to take everything that is offered here. Just present your papers and they will all be received, and the questions of materiality and relevancy will be determined at the close of the hearing. Present all the papers that you think are useful in giving you a preliminary injunction. They will be received without prejudice to the defendant's position and subject to their objection on the grounds of materiality and relevancy.

The only objection I want to know about is genuineness. If there is no objection to genuineness, present all the papers and let's get them marked and go on with the trial.

xxx (Plaintiff's Exhibit 4 received in evidence.)

THE COURT: Is Plaintiff's Exhibit 4 the current contract or is it a previous one?

MR. MENSCH: It's a prior agreement, your Honor.

THE COURT: All right.

Q I believe you testified that Restaurant Associates began its operations at Busch Gardens on December 4, 1969; is that correct?

A Yes.

Q Who did Restaurant Associates put in direct charge of its operations at Busch Gardens?

A The first general manager at Busch Gardens came from our operations here in New York. His name was Hening Anderson.

Q Would you briefly tell us his background?

A He had been at the former Twelve Seasons since the inception of the opening of the establishment and remained there as a maitre d' until 1969, and then went down to Tampa with a team of staff people from RA to begin operations at Tampa.

Q Beginning in 1969 what was the scope of Restaurant Associates' operations?

THE COURT: This has nothing at all to do with the injunction that you are seeking. Get down to the contract that exists between the parties and show me what the breach is and what the irreparable damage is claimed to be. I am not going to be taken through a travelogue here on matters you all have stipulated in Exhibit 1.

You are seeking to get an injunction on the basis of the fact that there is an attempted breach of agreement entitling you to equitable relief. Let's get on to that. I have the uneasy feeling that you haven't prepared for the trial.

MR. MENSCH: I have a very definite feeling that we have given all the preparation that two weeks can provide, into the wee hours of the morning.

I am going to be offering an agreement between the parties dated December 8, 1972 which is the last written agreement between them.

xxx (Plaintiff's Exhibit 5 received in evidence.)

Q Did Restaurant Associates complete the term under the prior October 22nd agreement?

A Yes, sir.

Q And that agreement expired when?

A I believe it was December 4, 1971.

Q When was the agreement dated December 8, 1972 signed?

A May 1973.

Q You are saying that although it's dated December 8, 1972 it wasn't signed by both parties until 1972 --

A May 1973.

Q In fact, Anheuser-Busch signed first, didn't they, earlier than Restaurant Associates?

A Yes.

Q By some months?

A Yes.

Q How were the parties' relationships governed between the date the first agreement expired and the date the second agreement was signed?

A Well, the first agreement expired December 4, 1971. The letter agreement extended the contract to December 26, 1971 and this was done to coincide with our fiscal closing. The draft agreement was prepared by RA and sent to Anheuser-Busch and we operated under an oral agreement until such time as the agreement was ultimately signed by both parties in May of 1973.

Q I show you Plaintiff's Exhibit 5 and I direct your

attention to paragraph 4.

A Yes, sir.

Q Paragraph 4 provides for the manner in which the agreement may be terminated, doesn't it?

A Yes, sir.

Q And it provides that it will continue from year to year unless one of the parties delivers a letter or a notice to the other party at least 90 days prior to the expiration date of the agreement stating that the agreement will be terminated; is that correct?

A Yes, sir.

Q Did Restaurant Associates ever get such a letter?

A No, sir.

Q Did Restaurant Associates ever enter into discussions with Anheuser-Busch with regard to a modification or extension of the December 8, 1972 agreement?

A The '72 agreement was orally modified at the term beginning December 26, 1973 which included a number of changes that went into effect at that time and continued that way until November 4, 1974.

Q What were those changes?

A Specifically there were some maintenance provision changes and we had at that time -- we had to seek relief on the rent structure which was 40 percent for the fast food

operations due to the inflationary pressures that were hitting us very hard in the cost of food. That relief was gotten.

Q Can you tell us what the rent modification was?

A The rent was reduced effectively from December 26th of '73 to November 4, '74 from 40 to 35 percent.

Q On the fast food operations?

A Yes, sir.

Q Was that reduction ever evidenced in writing? That is to your knowledge.

A The reduction is evidence in the billing we received from Anheuser-Busch for the fast food operations.

Q Was there an agreement between the parties?

A There was an oral agreement that was negotiated upon and a draft of that oral modification reached our offices in New York, I believe it was the latter part of January 1974, and it never got signed.

Q Did you attend a meeting in July 1974?

A July 30, 1974 at Tampa.

Q Who attended that meeting?

A From Restaurant Associates myself, Verne Clements, supervisor for the State of Florida, Sidney Sherman, our manager at Busch Gardens. For Anheuser-Busch Mr. Jim Bickle and Mr. William Thurman.

Q What was discussed at that meeting?

A That meeting was a culmination of some dialogue that had been taking place between Verne Clements and Jim Bickle as to the continuation of Restaurant Associates at Tampa. We concluded what we believed to be very successful negotiations and it included three major points.

Q What were those points?

A One, Anheuser-Busch had asked whether or not we could increase the rental payment coming from the Swiss House. We had prepared performers and we had evidence with us at the time that the inflationary pressure together with the drop of attendance had effectively reduced the profits at Swiss House year to date to about 5.2 percent of gross sales. We had not yet reached the new rent plateau and we had a new union contract coming up and so we concluded that segment of negotiation that the extension agreement for the Swiss House would remain, the rent agreement for the Swiss House would remain as it was.

Point two was the extension agreement for the Swiss House. In the early conversations that had begun we were talking about five years. Jim Bickle and Bill Thurman indicated two was okay and I asked for three, and they said they were going to try to get us three years.

The third point was that we were going to, because of this extension agreement, turn over to the Anheuser-Busch

organization the fast food operations effective November 4, 1974 which coincided with the end of the labor agreement, that term of the labor agreement.

We also discussed some marketing plans, whether or not we could in fact reduce the cost of operations at the Swiss House to effectively pay more rent. This was to be discussed at a later date and we shook hands and left.

Q What happened after that meeting? Did you get a communication from Anheuser-Busch?

A The next piece of communication I received was on September 18th, a draft of a proposed new agreement from Jim Bickle.

MR. MENSCH: I offer it, your Honor.

xxx (Plaintiff's Exhibit 6 received in evidence.)

MR. MENSCH: Plaintiff's Exhibit 6 is a letter dated September 18, 1974 from James R. Bickle of Anheuser-Busch to Ralph Tolve of Restaurant Associates together with a proposed agreement.

Q What did you do when you received that letter and the enclosure?

A I read the letter and the enclosure and passed it on to Lee Bernstein, our assistant general counsel, for review.

Q Do you know what she did?

A She had copies of the agreement made and forwarded them to the parties that were with me at the negotiations, Sidney Sherman and Verne Clements, and asked us to give her our comments about the draft we had received from St. Louis.

Q Did she receive those comments, to your knowledge?

A Yes, sir.

Q Then what did she do?

A The comments were incorporated in the draft agreement and the draft agreement had to be cleaned up a little because apparently it was in rough form. For example, the operating expenses were commingled with maintenance. It wasn't really defined as we had in the original '71 draft. As a result it would make accounting procedures a little difficult.

Also it cleaned up some of the things that had already been implemented. For example, we had already been providing operating reports weekly from Busch Garden operations to the local management at Tampa. The new draft agreement called for it to be done daily, and that provision had already been worked out with local management about two years ago and other things like that.

Q Do you know what she did?

A The other point was that the three-year term that Jim Bickle and Thurman indicated was possible was included

in that draft agreement.

Q And she sent a proposed draft agreement to Mr. Bickle?

A Yes, sir.

MR. MENSCH: I offer the letter from Miss Bernstein and the proposed draft.

xxx (Plaintiff's Exhibit 7 received in evidence.)

Q Between November and May, November 1974 and May 1975, did you receive any communications from Anheuser-Busch directly?

A No. I received some communication from Verne Clements regarding this.

Q Mr. Clements received communication from Anheuser-Busch, didn't he?

A Oral or written communications, both.

Q And Mr. Sherman received communications from Anheuser-Busch?

A Yes.

Q Were you ever advised by anybody either in the Restaurant Associates organization, that is Mr. Sherman or Mr. Clements or anyone else, or anyone from Anheuser-Busch, that there were difficulties with the Restaurant Associates operation at Busch Gardens or that you had some trouble there

or that they were dissatisfied with your operation?

A Not at all. In fact, to the contrary. We have a number of nice statements that came from their organization.

Q And November 4, 1974 did you turn over part of the operations at Busch Gardens that you were managing under the December 8th contract?

A Yes, sir.

Q What were they?

A Those were the fast food operations. These were turned over because of the belief that we had an agreement or the conviction that we had an agreement that was to run until at least 1976 and perhaps 1977. Of course, that did not have to be done.

Q On or about December 1974 did Restaurant Associates, to your knowledge, sign and extend its agreement with the union that had jurisdiction over its employees at Busch Gardens?

A That was negotiated with the manager we had at the premises, Sidney Sherman, and the local restaurant union.

xxx (Plaintiff's Exhibit 8 received in evidence.)

Q Incidentally, following the July 30th meeting between the representatives of Anheuser-Busch and Restaurant Associates to which you testified, was there a communication

to Mr. Clements that you are aware of?

A Yes, I received from Mr. Clements sometime after the 1st of August a copy of a letter that he had received from Mr. Bickle which pretty much fulfilled what we had already accomplished on the 30th, mainly to make some written modifications of the agreement in effect.

MR. MENSCH: I offer it.

xxx (Plaintiff's Exhibit 9 received in evidence.)

Q You testified that between November and May, November 1974 and May 1975, no complaints about Restaurant Associates' operations at Busch Gardens were brought to your attention; is that correct?

A Yes, sir.

Q In fact, as far as you know Anheuser-Busch regarded Restaurant Associates' operations there quite satisfactorily, didn't they?

A Yes, sir.

Q And they wrote some nice letters to members of the organization, including Mr. Sherman, didn't they?

A Yes, sir.

Q Did Mr. Sherman ever tell you that Anheuser-Busch was upset with Restaurant Associates?

A No.

Q As far as you know in your communications with Mr. Sherman, everything was rosy, wasn't it?

A I had limited communication with him but whatever I did have it was rosy.

Q And Mr. Clements never told you there were any difficulties there, did he?

A That is right.

Q Did you have any concern that Miss Bernstein had sent a proposed agreement to Anheuser-Busch in November 1974 and months passed and there was no, as far as you were concerned, written response?

A This was not an abnormal situation. There had been many times when this took place in the past and a communication with Verne and also from my own knowledge that Anheuser-Busch was in the process of opening a new theme park at Williamsburg that they were very busy doing all of this. We had orally implemented all of the negotiations that were concluded.

Q Did Mr. Sherman ever tell you before May 20th or 21st that he had been offered a job by Anheuser-Busch?

A No.

Q Did you get a telephone call from Mr. Clements on or about May 20, 1975?

A No.

Q How about May 23rd?

A May 23rd, yes.

Q What did Mr. Clements tell you?

A That he had heard from Mr. Sherman that Mr. Bickle was going to deliver to me on the morning of the 27th or the afternoon of the 27th a letter of termination.

Q Did Mr. Clements tell you when Mr. Sherman had spoken to him?

A Either the night before or that morning. It was very approximate.

Q Had you been called by a representative of Anheuser-Busch for an appointment?

A Approximately the week before the submission of the letter of termination.

Q When was that? What date approximately?

A The 20th or 21st.

Q Who called you?

A Mr. Bickle.

Q What did Mr. Bickle say to you?

A Mr. Bickle indicated that he and Mr. Thurman had reasons to be in New York to meet -- I believe he said concessionaires at the Empire State Building, however we can get together for a chat, and I invited them to have lunch with me that day.

Q Was there an agenda for the meeting?

A None whatsoever.

Q Did you understand it to be a business meeting?

A Not really. They happened to be passing through New York and we would have lunch together.

Q You testified to a telephone conversation with Mr. Bickle at which, as I recall, he indicated to you that he was planning to be in New York on May 27th, I believe, on other business and he would like to visit with you.

Is that the substance of what he said to you?

A Yes, sir.

Q How long did the telephone conversation take, if you recall?

A A very, very short time, a minute.

Q Were you looking forward to taking Mr. Bickle and his colleagues to lunch?

A Sure.

Q You had never done that before, had you?

A With them specifically in New York?

Q Yes.

A No.

Q And did Mr. Bickle arrive on the morning of May 27th?

A Yes, sir.

Q Who was with him?

A Mr. Bickle, Mr. Thurman and a gentleman from the marketing department of Anheuser-Busch, Mr. Lamonica.

Q Will you identify Mr. Thurman for us.

A I believe he holds the title of Gardens general manager.

Q Did Mr. Lamonica have anything to do with Busch Gardens as far as you know?

A He was concerned primarily in the other relationships at RA and Anheuser-Busch has, namely as a product consumer of Anheuser-Busch products. They were concerned that there would be some ill feelings.

Q Mr. Lamonica was there to sell you beer, wasn't he?

A To preserve the account, perhaps.

Q To preserve the beer sales Anheuser-Busch was making to Restaurant Associates installations.

What happened on May 27th?

A Well, the letter was almost immediately given to me and upon receipt I got kind of --

Q Stop there. I want to give the Judge the letter.

I show you a letter dated May 21, 1975. Was this the letter that was delivered to you?

A Yes.

Q In the upper left-hand corner it has the words "Registered Mail Return Receipt Requested." Was it mailed

to you?

A This was hand delivered to me.

THE COURT: When?

THE WITNESS: May 27th.

MR. MENSCH: I offer it.

xxx (Plaintiff's Exhibit 10 received in evidence.)

Q In substance Bickle told you that Restaurant Associates was through with Busch Gardens?

A Yes, sir.

Q That within a month you were going to pick up your knives and forks and glasses and spoons and be out of there; is that right?

A Yes, sir.

Q What did you say?

A I was very angry at the time and indicated that we had an agreement that was negotiated orally and was implemented almost to the detail and it was due to run through 1976 and perhaps 1977, and I didn't have too much dialogue except to call into our office our assistant general counsel Lee Bernstein and handed her the letter.

I asked him whether or not there were any issues that could be resolved, whether he was empowered to negotiate any problems or discuss any problems that had emerged. There

was no communication at all. He indicated that the decision had been made in St. Louis and he was really only an errand boy at that point in time.

Q Did he tell you why this was being done?

A He indicated that the degree of profitability was bothersome to St. Louis at this time because they were sustaining some loss figures with the operation.

Q What was his concern, that you were making too much money, Restaurant Associates was making too much money or too little money?

A I guess too much.

Q And that Anheuser-Busch was not getting enough, in his view?

A It was quickly stated and I didn't go into the discussion of that.

Q What happened after that?

A I attempted to continue the dialogue after the heat of the first conversation to see whether or not there could be some possibility of not having to go through this legal process, and I continued talking with them and with the marketing director. We shifted the conversation slightly talking about the economy and we went to lunch at the Promenade Cafe being the guest of Mr. Lamonica.

At that meeting I also indicated that since we

seemingly can't get nowhere, I was going to pursue conversations with St. Louis, specifically with Mr. Long and perhaps Mr. August Busch, III, the current officer and chief executive officer.

Q Did you call Mr. Long?

A Later on that week or the following week.

Q Did he talk to you?

A I attempted to get Mr. Long on two occasions and there was no return call.

Q Did you try to get anyone else at the Busch organization?

A I myself dialed the number to the office of August Busch, III, the president and chief executive officer, and spoke at length with the secretary indicating that I wanted to chat with him on a pretty urgent matter. She told me he would be out of town at one o'clock until one o'clock the next day, and I never received a return call.

Q You left your name and telephone number?

A Yes, sir.

Q Did Mr. Bickle tell you that they had come to an agreement with Sidney Sherman to take your place?

A Not at all.

Q You didn't discuss Mr. Sherman at all?

A No.

Q The May 21st letter refers to a letter dated August 1st, 1974.

MR. KHEEL: I am confused. Isn't the August 1 letter in evidence?

MR. MENSCH: Yes, it is. I am just showing him a copy.

THE COURT: He has both of them in front of him.

Q Did you regard the August 1st, 1974 letter as a notice of termination?

A No.

Q Did anyone at the Busch organization ever tell you that they considered it to be a notice of termination?

A No.

Q To your knowledge, did anyone at the Busch organization tell anyone in the Restaurant Associates organization?

A No.

MR. MENSCH: I have no further questions, your Honor.

THE COURT: Any cross-examination, Mr. Kheel?

MR. KHEEL: Yes, your Honor.

CROSS-EXAMINATION

BY MR. KHEEL:

Q Mr. Tolve, did you receive a letter dated September 24, 1973 from Dennis Long?

A Let me see the letter, please.

Yes, sir.

MR. KHEEL: I would like to offer it in evidence. I have shown a copy to our adversaries.

THE COURT: Received as Defendant's Exhibit A.

xxx (Defendant's Exhibit A received in evidence.)

Q Mr. Tolve, at any time after you received this letter of September 24th, Defendant's Exhibit A in evidence, did Busch send you a letter rescinding this notice or this letter?

MR. MENSCH: Objection.

THE COURT: Overruled.

MR. MENSCH: He characterized the letter.

THE COURT: There has been a lot of characterization.

A The letter of September 23rd was a little redundant insofar as a letter of September 17th to Verne Clements had begun to establish what that letter was intending to do to reopen some areas of oral communication regarding the agreement.

MR. KHEEL: I move to strike his testimony as not responsive.

THE COURT: Strike it out.

He wants to know whether the letter of September 24th, Exhibit A, was countermanded at any time in any communication oral or in writing.

THE WITNESS: No.

Q On your direct testimony, Mr. Tolve, reference was made to a draft written agreement submitted to you or your office at some point in early 1974; is that correct?

A Can I see the document, please?

Yes, sir.

MR. KHEEL: I would like to have that submitted in evidence, your Honor.

xxx (Defendant's Exhibit B marked for identification.)

Q I would like to call the Court's attention and the witness' attention to the preamble of the amendment or the document enclosed with this letter which contains language as follows:

"Busch gave Associates timely notice of its intent to terminate the agreement on December 25, 1973 if it could not renegotiate certain terms of the agreement."

MR. SCHAEFER: If I might be heard in response to that.

THE COURT: There is no response. There is no question that has been asked yet.

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MR. SCHAEFFER: Mr. Kheel has directed your attention to a certain provision, your Honor.

THE COURT: You are interrupting the cross-examination, I am sorry.

MR. SCHAEFFER: Yes, sir.

THE COURT: What is the question?

MR. KHEEL: I wanted to call that to your attention. I am not sure Exhibit B was marked in evidence. It may have just been put in for identification.

xxx (Defendant's Exhibit B for identification received in evidence.)

Q Mr. Tolve, did you sign an affidavit in connection with the motion of the plaintiffs in this action?

A Yes, sir.

Q In connection with your affidavit, did you review the affidavit of Mr. Verne Clements also submitted in support of the motion?

A Yes, sir.

Q In anywhere in your affidavit or Mr. Clements' affidavit was there reference made to Defendant's Exhibit A for identification, the letter of September 24, 1973?

MR. SCHAEFFER: Objection. The affidavit speaks for itself and what it contains it contains and what it doesn't it doesn't.

THE COURT: I have read the affidavit.

MR. KHEEL: I withdraw my question.

Q Did you ever sign Defendant's Exhibit B for identification or anyone on behalf of Restaurant Associates?

A What is Exhibit B?

Q The draft agreement mailed January 28, 1974.

A No, sir.

MR. KHEEL: It was put in evidence, wasn't it?

THE COURT: Yes.

Q During 1973 did you attend a meeting in Tampa, Florida with representatives of Anheuser-Busch?

A Yes.

Q Was there a discussion at that time concerning the subject of the fast food operations by Restaurant Associates?

MR. MENSCH: Your Honor, can we fix the persons present and the place?

THE COURT: If it's not done on cross-examination, you may do it on redirect.

A Can I have the date of that meeting, please.

Q A meeting in or about May of 1973.

A Not that I recall.

Q Was there a meeting on May 31, 1973 at the Old Swiss House?

A I am sorry, I don't recall that.

Q During 1973 did you at any time have a discussion with representatives of Anheuser-Busch concerning the fast food operations?

A I believe there was a meeting in March '73.

Q Can you tell me where was that meeting?

A That meeting was held at Tampa.

Q Who was present?

A There was myself -- I am trying to think of the names now. Mr. Clements perhaps may have been there. Mr. Anderson was the general manager at the time. I don't know whether Mr. Long was there. He may have been. He was at one of the meetings that took place at Tampa. And Mr. Bickle and I believe some of the Garden management personnel.

Q At this meeting did you discuss with them the Restaurant Associates' desire to get out of the fast food operations?

A We never discussed that.

Q You never discussed it?

A No.

Q Did you tell Anheuser-Busch that you were losing lots of money in the fast foods operation?

A Never.

Q You never told them that?

A This was what point in time now?

Q You were talking about a meeting in March 1973.

A There was a meeting in '73 that took place which allowed the rent to be reduced. I have difficulty in putting this into a time frame unless I see some written document.

Q Why was the rent reduced?

A Because of the inflationary pressures that were on us.

Q You mean Restaurant Associates was not making enough money?

A We weren't losing money.

Q Were you making enough money?

A Yes.

MR. MENSCH: Objection. What does enough mean?

MR. KHEEL: Withdrawn.

THE COURT: Proceed.

Q At this meeting in March or at a meeting shortly thereafter did representatives of Anheuser-Busch tell you that they were extremely dissatisfied with your operations?

A That was never told to me.

Q That was never told to you?

A No.

Q Did Anheuser-Busch tell you that the facilities were badly taken care of in terms of cleanup?

A Never.

Q Did they tell you that they wanted to take over the operations in March or thereabouts of 1973?

A The discussions with Anheuser-Busch regarding the takeover of fast foods had really begun way back in '71 and continued periodically. At one point in time we prepared an elaborate study for them which indicated that a takeover by them at a certain point in time while the union agreement was in effect would cost somewhere around $100,000 additional cost. Although the conversation began in '71 and I believe '73, it was never implemented until '74.

Q So there was discussion about that going back --

A But never regarding RA's loss of money and never on ears that were deaf, so we were able to renegotiate and --

Q I would like you to answer the question. I thought you went beyond that. I want to know whether in 1973 there were discussions about Restaurant Associates being removed from running the fast food facilities and having Anheuser-Busch take them over.

MR. MENSCH: Objection to the word "removed."

THE COURT: Overruled.

A No.

Q There were not?

A No.

Q During 1973 were you informed of customer complaints

about the surliness of Restaurant Associates employees at the fast food operations and at Old Swiss House?

A No.

Q Were you informed of customer complaints in any respect about Old Swiss House or the fast food operations?

A I may have gotten one or two complaints out of the thousands of customers we serve a year, yes.

Q You indicated on your direct testimony that there was a meeting in or about July 1974 at which the subject of a continuing business relationship between Anheuser-Busch and Restaurant Associates was discussed; is that correct?

A Yes, sir.

Q And at this meeting, as I understand your direct, you referred to three major points that had been agreed to. The first was that Old Swiss House rent would not be increased.

A Yes.

Q The second was that the agreement would be extended for two or three years.

A Yes, sir.

Q As to Old Swiss House only.

A Yes.

Q And the fast food operation would be taken over by Busch as of November 4th; is that correct?

A Right.

Q At this meeting was there any discussion about whether Busch would sign an agreement which would prohibit it from opening restaurants that competed with Old Swiss House?

A That wasn't discussed.

Q And at this meeting in July 1974 was the subject of a right of first refusal relating to the fast food operations discussed?

A I don't know what you mean by that.

Q Was the subject of whether Restaurant Associates would be given a right of first refusal if and when Busch decided to go out of the operation of the fast food restaurant?

A I don't recall whether that was discussed. I don't believe so though.

Q At this meeting in July 1974 was the subject of how many maintenance men Restaurant Associates would employ discussed?

A Maintenance men?

Q The number of maintenance men.

A No.

Q And at this meeting was there a discussion about who was to be responsible for routine maintenance expenditures?

A No.

Q And at this meeting was there a discussion about whether Busch would be indemnified by Restaurant Associates by reason of contractors or invitees entering the premises?

A No.

Q And at this meeting was there a discussion as to whether Restaurant Associates would indemnify Busch if it entered into contracts beyond its authority?

A No.

Q Am I correct that under the prior agreements Restaurant Associates was an agent with authority to enter into contracts binding --

MR. MENSCH: Objection. It calls for a legal conclusion.

Q Do you know if Restaurant Associates entered into any contracts in behalf of Busch during the term of the old agreements?

MR. MENSCH: Objection, your Honor.

THE COURT: Overruled.

A The only agreement that I knew of that was in effect is the labor agreement.

Q Was there any discussion at this July 1974 meeting concerning whether the new agreement would make reference to the prior written agreements?

A No.

Q I believe two documents have been marked in evidence. The first, Plaintiff's Exhibit 6, is a letter and draft agreement which was forwarded by Mr. Bickle and Exhibit 7 is a document and a cover letter prepared or sent by Leonia Bernstein to Mr. Bickle. You have seen those earlier; is that correct?

A Yes, sir.

Q Have you ever read Plaintiff's Exhibit 7 for identification?

A 7 is the latter one?

Q The one prepared by Miss Bernstein.

A Yes, I have.

Q Have you read Plaintiff's Exhibit 6 in evidence?

A Yes, sir.

Q Can you tell me whether there are any differences?

A There are.

Q Can you tell me whether Plaintiff's Exhibit 7 contains a paragraph that relates to noncompetition?

MR. MENSCH: Objection. He doesn't have the document and it does speak for itself after all.

THE COURT: That is very easily cured.

Here is Number 7.

Q Let me withdraw the question for the moment but please hold that.

In the moving affidavits of Mr. Clements and yours reference is made to the fact that Plaintiff's Exhibit 6 in evidence embodies the terms agreed to in the July meeting. Do you recall making that statement?

MR. SCHAEFFER: I am going to object to the form of that question. If Mr. Kheel wishes to offer that affidavit into evidence in this proceeding --

THE COURT: That is not necessary. All he needs to do is to just read from the affidavit the particular part.

MR. SCHAEFFER: I would ask for that courtesy at the least.

THE COURT: That is not a courtesy, that is a legal requirement. Some legal requirements are not courteous at all.

Q Paragraph 21 of Mr. Clements' affidavit which I believe you indicated you read, he says, and I am quoting:

"Instead after the parties had agreed to the new arrangement proposed by defendant, defendant by letter dated September 18, 1974 forwarded a draft of a proposed new agreement embodying the new terms agreed upon."

Do you agree with that statement?

A Yes, sir.

Q Calling your attention to Plaintiff's Exhibit 7 in evidence, I believe it's page 13, specifically subparagraph B --

MR. KHEEL: Your Honor, would you like an extra copy of any of these documents?

THE COURT: I have everything I need right here. Thank you.

Q Do you see subparagraph B on page 13?

A Yes, sir.

Q It relates, does it not, to a noncompetition agreement?

A Yes, sir.

Q And that subject you testified was not discussed at the July meeting, am I correct?

A No.

Q Did the Plaintiff's Exhibit 6 in evidence --

THE COURT: The way the question was phrased I don't know what the answer means. Was it discussed or was it not discussed? Was the noncompetition clause discussed or not discussed?

THE WITNESS: Not discussed.

Q Is there such a provision in Plaintiff's Exhibit 6 in evidence, the draft agreement prepared by Busch?

MR. MENSCH: Objection.

MR. KHEEL. Would you agree it doesn't contain such a provision?

MR. MENSCH: I don't have to agree --

THE COURT: This is not a forum for a debate. Kindly make your objections legally.

A I would have to reread this again.

THE COURT: Reread it and see if there is anything to do with competition or lack of competition.

Did your lawyer initiate the suggestion of a non-competition clause in the draft that your lawyer sent, the counterdraft that your lawyer sent?

THE WITNESS: Yes, your Honor.

Q The carryover part of that same paragraph on page 14 refers to a covenant by Busch which as I understand it would have permitted Restaurant Associates the right of first refusal if Busch went out of the fast food operations.

Was that subject discussed at the July 1974 meeting?

A No.

THE COURT: What was that subject?

THE WITNESS: Right of first refusal on the fast food operations.

Q Did your attorney also put that provision in the agreement for the first time?

A Yes.

THE COURT: In other words, these were counter-proposals that Restaurant Associates was making to Busch?

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THE WITNESS: They were draft proposals that were embodied.

THE COURT: Anything that doesn't mean a proposal is a counterproposal, isn't it?

THE WITNESS: Those issues didn't come up at the discussions, your Honor. This is why it's hazy.

THE COURT: Then it's something added and it was sent on with a request that it be signed with the additions?

THE WITNESS: Or reviewed. We didn't expect either one of these copies would go without some more communications.

Q Calling your attention to page 5 of Plaintiff's Exhibit 7 for identification, subparagraph 6, can you tell me how many maintenance men were to be employed by Restaurant Associates under the terms of this proposal?

A What page?

Q Page 5, subparagraph 6, about three down from the top of the page.

A On page 5?

Q Of Exhibit 7, I am sorry.

A Employ on a full-time basis two maintenance men to do minor maintenance for the routine operation of the restaurant.

Q I call your attention to page 5 of Exhibit 6 in evidence at the top of the page. How many maintenance men

would be required under the Busch proposal?

A "Employ on a full-time basis three maintenance men to do minor maintenance work, to do the routine operation of the restaurant and to perform routine cleaning tasks."

Q So your attorney then changed the number of maintenance men from three to two; is that correct?

A Actually, if you kept this --

Q I want a yes or no.

A Yes.

Q I would like to call your attention now to page 7 of Exhibit 7 in evidence. Make that page 8, the carryover paragraph. Under B on the carryover paragraph, the second sentence reads:

"It is the general intent of the parties that Busch will bear the cost of all such maintenance, replacement and repair work including without limitation repair and replacement of capital equipment and minor or routine maintenance except the cost of labor where such minor or routine maintenance can be performed by Associates' maintenance men in which event such cost will be charged to operating expenses."

Under this paragraph would Busch be responsible for replacement of light bulbs and fuses?

A I can't answer that. You would have to get Sidney Sherman to answer those kinds of questions.

Q Calling your attention to Plaintiff's Exhibit 6 in evidence, page 7, subparagraph B, the second sentence there begins:

"It is the general intent of the parties that Busch will bear the expense of major maintenance work including repair and replacement of capital equipment and that minor or routine maintenance and cleaning costs will be charged to operating expenses."

That means charged to Restaurant Associates, does it not?

A Yes.

Q Your attorney changed that language as well also, did she not?

A I don't believe that is what is embodied in this. It's not the way it works now.

Q Was there a change in language by your attorney?

A I would have the lawyer to read this and see what the intention is.

THE COURT: Let me see it.

Go ahead.

Q I would like to call your attention now to page 11 of both Exhibits 6 and 7 in evidence. Subparagraph A of Exhibit 6 in evidence which is the Busch proposal at the end refers to certain persons or entities that Associates would

indemnify Busch against and that list includes agents, employees, invitees, contractors and others doing business with it.

Could you look at subparagraph A of Exhibit 7 in evidence and see if the words invitees, contractors and others doing business with it appear?

MR. MENSCH: Objection.

THE COURT: What ground?

MR. MENSCH: To the extent there are differences in the agreement, the differences speak for themselves.

THE COURT: It's a very easy way for me to find out what the counterproposals were. It's perfectly clear that these were trains not running on the same track but running in opposite directions in three or four instances.

Counsel is now bringing them to my attention and he is bringing them to my attention through the witness who seems to be the most knowledgeable person in the whole affair because he participated in the negotiating sessions. It's an entirely appropriate way of facilitating the Court's consideration of the matter.

I suppose I can hunt underneath each of the words to find out what is so obvious merely by having it pointed out to me. I don't propose to do that.

MR. MENSCH: To a large extent the questions call

for responses which perhaps only a lawyer can properly make.

THE COURT: I don't think only a lawyer needs to be called upon to say who bears the maintenance one way or the other. It is becoming apparent through this cross-examination that terms were proposed by one side and opposite terms were proposed by the other side.

So that the stateme which started this whole thing in the affidavit that the papers that were submitted represented agreed terms seems to be questionable and that is what counsel is trying to bring out.

You may proceed.

MR. KHEEL: Thank you, your Honor.

I believe there is a pending question with respect to whether the words invitees, contractors or others doing business with it appear in the Restaurant Associates draft.

THE COURT: Sharpen that.

What is the difference between the two provisions? One embraces a group of people that are included and another one does not. Is that your point?

MR. KHEEL: Correct, your Honor.

THE COURT: Was there any discussion in the negotiating sessions of this point?

THE WITNESS: No, sir.

THE COURT: So that when the one side presented the

proposal, it was a proposal that hadn't even been discussed, and when the other side came back with a counterproposal, that too had not been discussed?

THE WITNESS: Exactly.

THE COURT: And both were talking about matters that had not been agreed upon; is that right?

THE WITNESS: Right.

THE COURT: And they had different views as to how they should be resolved?

THE WITNESS: Right.

THE COURT: Go ahead.

BY MR. KHEEL:

Q Mr. Tolve, I would like to call your attention to page 12 of Exhibit 6 which is the Busch draft. Please notice on the carryover paragraph, subparagraph D as in David, was such a paragraph omitted from the Restaurant Associates draft, Exhibit 7 in evidence?

THE COURT: That really doesn't carry any force to it.

Was there a discussion of that subject matter in the negotiating sessions?

THE WITNESS: What paragraph is this one?

Q Paragraph D, the carryover, relating to indemnification to contracts they had entered into without Busch's

authority.

THE COURT: Was that discussed in the negotiating sessions?

THE WITNESS: No, your Honor.

THE COURT: So that Busch was then proposing a matter that hadn't been discussed; is that what you are suggesting?

MR. KHEEL: It's in the Busch draft and taken out by Restaurant Associates.

THE COURT: I suppose if it hadn't been discussed and Busch put it in, then Busch was promoting something that wasn't there.

MR. KHEEL: I believe it may have been in some prior agreements, your Honor.

THE COURT: I am not accepting your belief as testimony.

Q Mr. Tolve, I believe you testified earlier that the Busch draft embodied the terms that had been agreed upon in July.

A It embodied the business terms.

THE COURT: That is not what the affidavit said. The affidavit didn't say that at all. The affidavit of your colleague said that the draft forwarded by the letter of September 18th of the proposed new management agreement was,

one "embodying the new terms agreed upon."

THE WITNESS: The terms that were agreed upon at that meeting in July, your Honor.

THE COURT: Therefore if it embodied the terms agreed upon, it must have embodied a term relating to indemnity and when it was removed from there, the Restaurant Associates were removing something that had been agreed upon. You can't have it both ways.

Go ahead with the next question.

Of course, the answer to that may be that the affidavit is suspect rather than the draft. The affidavit may be in error.

MR. KHEEL: I would hope we may find that at some point.

Q I would like to call your attention to page 14 of Exhibit 7. Make it 15 of Exhibit 7. Do you see the paragraph captioned amendment and termination of prior agreement?

A Yes, sir.

Q Was that subject discussed in July 1974?

A No, sir.

Q Does any of that language appear in the Busch draft, Exhibit 6 in evidence?

A No, sir.

Q That was added also by your attorney?

THE COURT: What is the subject matter of that?

MR. KHEEL: The subject matter of this appears to be an attempt to amend and bring --

THE COURT: No. Just tell me the subject matter.

MR. KHEEL: The subject matter is the termination of amendments and prior agreements.

MR. MENSCH: Can the witness' attention be directed, and the Court's attention, to the letter which accompanies the draft?

THE COURT: You may do that on redirect examination.

Q Mr. Tolve, I would like to refer your attention now to page 5 of Exhibit 7 in evidence and page 5 of Exhibit 6 in evidence. The last paragraphs on both pages.

A Same page number?

Q Same page number in both exhibits. The subject matter of these paragraphs appears to be the time when certain accounting information is to be submitted to Busch.

Can you tell me whether there is a difference in the time period?

A Yes, sir.

Q One is three weeks and one is four weeks?

A Yes, sir.

Q Was that subject discussed in the July meeting?

A No, sir.

jqlm Tolve-cross

Q Do you know when in fact the most recent statement was rendered to Busch by Restaurant Associates in connection with financial reporting?

A What kind of statement?

Q The statements called for under the terms of either paragraphs on 5 or 7.

A Operating statements are rendered weekly at Tampa from the operations on location and they are rendered from our accounting department when prepared.

Q Do you know if a letter was sent on June 27, 1975 to Busch enclosing operating statements for the months of November through May 1975?

A Yes, sir.

Q Was that the first such report of this nature during 1975?

A I don't know.

Q In the affidavit in support of the moving papers reference is made to the fact that the terms, the duration of these two documents, are different. Is it true that the Busch proposal was for two years and Restaurant Associates was for three?

A Yes, sir.

Q After Exhibit 7 in evidence was sent to Busch did you have any conversation with Mr. Bickle or Mr. Long?

A No.

MR. MENSCH: Can you fix a time? Between when and when?

Q Have you talked to Mr. Long or Mr. Bickle since?

A Yes.

Q Prior to the meeting you testified on direct with Mr. Bickle in a telephone conference in anticipation thereof --

A No.

MR. KHEEL: Could you give me a moment to consult my distinguished colleague before I proceed?

THE COURT: Yes.

Q Mr. Tolve, directing your attention to the meeting in or about May 27th in which Mr. Bickle and Mr. Thurman were present, was the subject of Mr. Sherman at all discussed?

A No.

Q Did you say to Mr. Bickle, "I understand you have been having discussions with Mr. Sherman"?

A I don't recall that.

Q Prior to the May 27, 1975 meeting had Mr. Sherman told you that he was having discussions with Busch?

A No. Prior --

Q Prior to May 27th.

A Yes.

Q In fact, you said in your affidavits that such

conversations between yourself and Mr. Sherman had in fact occurred?

A Yes.

Q So at the meeting of May 27th you were aware that Busch was having conversations with Mr. Sherman; is that correct?

A Yes.

MR. KHEEL: I have no further questions of this witness at this time, your Honor.

THE COURT: Any redirect?

MR. MENSCH: Yes. Can I have a few moments before I continue redirect?

THE COURT: Yes. While you are doing that I will ask some questions.

I call your attention in Exhibit 7 to the clause prepared by your attorney on the last page of the draft of the revised agreement, in relation to amendment and termination of the prior agreement, and it reads:

"The prior agreement as herein amended is extended for the period commencing as of December 26, 1973 and shall terminate November 3, 1974."

Do you know of any reasons why that was inserted? That is on the last page.

THE WITNESS: Your Honor, beginning December 26,

1973 based upon communications that took place in '73 there was an oral extension or oral modification of the agreement that reduced the rent from the fast food operation from 40 to 35 and charged some of the maintenance provisions.

I believe Msss Bernstein was trying to tag all of this written and oral together in this. I would have to ask her.

THE COURT: That communication that I called your attention to came to your organization on November 7, 1974.

THE WITNESS: That was sent to Anheuser-Busch on that date.

THE COURT: Sent to Anheuser-Busch and it provides for a termination of the 1972 agreement which had run on to December 25, 1973, as I say, provides that that arrangement for the ensuing year, December 26, 1973, should terminate before its normal expiration and on November 3, 1974.

Had there been any discussion in the negotiating sessions that there should be an early termination of the old agreement?

THE WITNESS: I am not aware of that, your Honor.

THE COURT: All right.

MR. MENSCH: I would like a few minutes if I may have it, your Honor.

THE COURT: Go ahead, we will sit here and wait

for you.

MR. ZUCKER: May I be permitted to address the Court, please?

THE COURT: We are in recess.

MR. ZUCKER: It has nothing to do with the merits of the case. Mr. Sherman, the witness, is here. Can we please be excused until two o'clock or such time as the Court may declare that we return?

THE COURT: Your first suggestion is very good. Two o'clock is fine.

MR. ZUCKER: Thank you very much.

MR. MENSCH: We were going to call Mr. Sherman next.

THE COURT: You will not have time to call him before the recess.

(Recess.)

REDIRECT EXAMINATION

BY MR. MENSCH:

Q Mr. Tolve, are you a lawyer?

A No, sir.

Q Was there a lawyer present representing Restaurant Associates at the July 30, 1974 meeting to which you testified?

A No, sir.

Q Was there a lawyer present representing Anheuser-Busch at that meeting?

A No, sir. Excuse me, I don't know whether Mr. Thurman or Mr. Bickle have law degrees. I don't know that.

Q There was nobody there who said that he is a lawyer representing Anheuser-Busch?

A Right.

Q As you know Mr. Bickle and Mr. Therman they are Anheuser-Busch operating people, aren't they?

A Yes, sir.

Q At the July 30th meeting did you discuss the indemnity provisions that were supposed to be in this agreement? Was there any reference to indemnity at all in that meeting?

A No, sir.

Q Do you know what the word indemnity means?

A Yes, sir.

Q Had you ever, in your discussions over the years and in your meetings over the years with the Anheuser-Busch people, discussed the indemnity provisions?

A No, sir.

Q You left those for the lawyers, didn't you?

A Yes, sir.

Q Let's go to the subject of maintenance. Is it true that maintenance was the subject of continuing discussion between Anheuser-Busch and Restaurant Associates?

A Yes, sir.

Q I show you a letter dated November 23, 1971, I believe to you from Anheuser-Busch.

A Yes, sir.

MR. KHEEL: I have a continuing objection to the relevance of this kind of document.

THE COURT: All documents will be received and be given the appropriate consideration.

xxx (Plaintiff's Exhibit 11 received in evidence.)

Q I show you another letter, a copy of another letter addressed to you from Anheuser-Busch dated March 13, 1973.

A Yes, sir.

Q I call your attention to the first sentence in that letter. Would you read it.

A "The contract for the period December 26, 1971-December 25, 1973 between Anheuser-Busch and Restaurant Associates although never signed has been agreed to by both parties."

xxx (Plaintiff's Exhibit 12 received in evidence.)

Q I am going to show you a copy of that letter and direct your attention to paragraph 2.

A Yes, sir.

Q If you look at it quickly and turn the page --

A Yes, sir.

Q Isn't that a page and a half or two pages of correspondence all directed to the subject of maintenance?

A Yes, sir.

Q Restaurant Associates is presently operating at Busch Gardens, aren't they?

A Yes, sir.

Q And they are performing maintenance work at the Old Swiss House?

A Yes, sir.

Q How many maintenance people do Restaurant Associates have?

A Right now on the payroll?

Q Right now on the payroll.

A Two.

Q At the premises.

A Two.

Q Are there any other people, any more people, who do maintenance or repair work?

A Maintenance or repair per so?

Q Or related work.

A We have utility people and there are 15 of them.

Q What do the utility people do?

A Janitorial functions and probably would assist in certain areas of moving and light maintenance.

Q But at the moment there are two people on Restaurant Associates' payroll doing maintenance work?

A I would have to have that confirmed.

Q That is what you understand?

A Maybe somebody went out sick or something. I don't know.

Q I show you a letter dated November 7th from Miss Bernstein which is part of Plaintiff's Exhibit 7.

A Yes, sir.

Q I direct your attention to the second sentence. Would you read that sentence.

A Yes.

Q What does it say?

A "You will note that I have also added a provision article 28 covering the extension of the prior agreements through November 3, 1974 with certain amendments to provide for what was actually in effect with respect to the total operation."

Q Did you discuss the maintenance provisions with Miss Bernstein before she sent this letter out?

MR. KHEEL: I will object to that as not binding on our client.

THE COURT: Sustained.

Q As far as you know Plaintiff's Exhibit 7 was mailed to Mr. Bickle on or about the date it bears?

A Yes, sir.

Q Was there a written response from anybody at Anheuser-Busch to this letter?

A No, sir.

Q They never objected in writing to any of the provisions of that agreement?

A No, sir.

Q As far as you know were there ever any telephone calls or oral communications from Anheuser-Busch objecting to any of the provisions or saying that this is not what we agreed to?

A No.

Q None at all?

A No.

Q And you are continuing to manage the facilities in the manner that you have up to now?

A Yes, sir.

Q And to this day you are managing them, aren't you?

A Yes.

MR. MENSCH: No further questions.

THE COURT: Have you got the original of Exhibit A,

the letter of September 24, 1973? I would like to see the original.

MR. KHEEL: We have several extra copies.

THE COURT: I want the original.

MR. SCHAEFFER: We have the original, your Honor, and we will offer it in place of the copy.

THE COURT: Is there any objection, Mr. Kheel, for substituting the original?

MR. KHEEL: No objection whatsoever.

THE COURT: The original has attached to it what purports to be the envelope. Look at it and see if there is any objection to any part of it. The clerk may substitute it by taking off the mark.

MR. KHEEL: I have no objection.

THE COURT: The exhibit mark will be placed on the original.

RECROSS-EXAMINATION

BY MR. KHEEL:

Q Mr. Tolve, after November 7, 1974 did Busch ever accept the terms proposed in the draft enclosed in the letter of November 7th?

A No.

MR. KHEEL: No further questions.

THE COURT: Thank you very much. You may step down.

(Witness excused.)

jq1m 65a

THE COURT: We will take a recess now until two o'clock. I assume you don't want to start for the next five minutes.

MR. SCHAEFFER: No, your Honor, our next witness is Mr. Sherman and he is expected back at two o'clock.

(Luncheon recess.)

AFTERNOON SESSION

2 p.m.

(In open court.)

THE COURT: Call your witness.

MR. SCHAEFFER: Sidney Sherman.

S I D N E Y S H E R M A N, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHAEFFER:

Q Mr. Sherman, would you state your residence address, please.

A 209 Tanglewood Place, Temple Terrace, Florida.

Q Are you currently employed by Restaurant Associates Industries, Inc., the plaintiff in this case?

A Yes.

Q Are you currently employed as general manager for operations of Restaurant Associates Industries, Inc. at Busch Gardens?

A Yes.

Q Are you attending court today pursuant to a subpoena served upon you on June 26, 1975?

A Yes.

Q During the month of May 1975, Mr. Sherman, did you

enter into an agreement with the defendant Anheuser-Busch, Inc. in writing?

A Yes, I did.

Q Do you have a copy or the original of that agreement present with you in court today?

A Yes.

Q Can I have that agreement, please.

A Yes.

Q Mr. Sherman, I show you this 13-page document and ask you if it bears your signature.

A Yes, it does.

MR. SCHAEFFER: Your Honor, I would offer as Plaintiff's Exhibit 13 in evidence an agreement dated May 30, 1975 between Anheuser-Busch Incorporated and Sherman Management Corporation.

MR. KHEEL: We have no objection, your Honor.

THE COURT: Received.

xxx (Plaintiff's Exhibit 13 received in evidence.)

Q Mr. Sherman, would you have another copy of that exhibit present with you in court today?

A I don't know if Mr. Zucker has another copy.

THE COURT: Is this basically an agreement similar to the one Restaurant Associates had with Anheuser-Busch

prior to this time?

THE WITNESS: No.

THE COURT: It's an agency agreement, isn't it?

THE WITNESS: A personal service agreement for me to manage the place, manage the restaurant for a fee.

THE COURT: Isn't that what Restaurant Associates had, a personal service agreement?

THE WITNESS: This doesn't call for me to keep any of the profits. I just get a fee.

THE COURT: Except for the manner of compensation it's an agency arrangement to run Busch Gardens, isn't it?

THE WITNESS: Yes.

THE COURT: All right.

MR. SCHAEFFER: I beg the indulgence of the Court for a moment. I haven't seen this document before today and I ask counsel for Mr. Sherman whether they have another copy so I can peruse it as well.

Q You testified you are presently employed by Restaurant Associates Industries, Inc.?

A Yes.

Q How long have you been employed by Restaurant Associates Industries, Inc., the plaintiff in this case?

A Approximately ten years.

Q Is it a fact that between 1965 and 1973 you were

the maitre d' at the Tavern on the Green Restaurant in New York City, a restaurant operated by Restaurant Associates?

A Yes.

Q From on or about January 1st, 1974, Mr. Sherman, isn't it a fact that you served as general manager for operations for Restaurant Associates at Busch Gardens?

A Yes.

Q So that you have been there for approximately 18 months?

A Correct.

Q Can you tell me what your duties are, Mr. Sherman, as general manager for operations for Restaurant Associates at Busch Gardens?

A Generally it's to supervise the operation of the restaurant.

Q That being the Old Swiss House?

A Yes.

Q Prior to November 4, 1974 did you have duties in addition to that?

A That included the supervision of the snack bars too in the Gardens.

Q Can you tell me what your compensation is weekly from Restaurant Associates?

A Yes, I receive $500 a week.

Q You receive $26,000 per year?

A Yes.

Q Did you, Mr. Sherman, during the month of April 1975 receive a bonus from Restaurant Associates in the amount of $5,000 based upon services you had provided to Restaurant Associates at Busch Gardens?

A Yes.

Q Mr. Sherman, I call your attention to July 30, 1974 and ask if you were present at a meeting on that day.

A I don't remember what the date was. What meeting are you referring to?

Q During the month of July 1974 were you present at a meeting in Tampa, Florida in the Old Swiss House with Ralph Tolve, Verne Clements, Mr. Thurman and a Mr. Bickle?

A Yes.

Q Do you recall the date of that meeting?

A I don't remember the exact date.

Q Did a certain conversation take place at that meeting?

A Yes, there was conversation.

Q What would you say the length of that meeting was, Mr. Sherman? That is in terms of minutes or hours.

A I don't quite remember. An hour or two hours, I am not sure.

Q Mr. Sherman, did you participate in the discussion that day?

A Very little.

Q I take it you were present at that meeting in your capacity as general manager for operations at Busch Gardens for Restaurant Associates?

A Yes.

Q As of that day would it be correct Restaurant Associates was managing not only the Old Swiss House, but the snack bars and fast food operation as well?

A Yes.

Q Was there a discussion on July 30, 1974 at that meeting, Mr. Sherman, relative to an agreement for the extended management and operation of the Old Swiss House by Restaurant Associates for Anheuser-Busch?

MR. KHEEL: Your Honor, the witness has testified he does not recall the date of the meeting and so much of the question assumes that day that I move to strike.

MR. SCHAEFFER: Your Honor --

THE COURT: This is not a time for cross discussion. The objection is overruled.

(Question read.)

THE COURT: Did they talk about an extension of the agreement at Restaurant Associates?

THE WITNESS: Yes.

Q Who participated in that portion of the conversation?

A I think most of the discussion was between Mr. Bickle and Mr. Tolve.

Q And Mr. Tolve is vice president of Restaurant Associates. Do you know what Mr. Bickle's title is?

A Director of merchandising for Anheuser-Busch.

Q Can you tell me, Mr. Sherman, what it is that Mr. Tolve said that day and what it is that Mr. Bickle said that day relative to the extension of the management agreement at the Old Swiss House?

A I don't remember the entire discussion, but basically Mr. Tolve was asking for a longer agreement. I think he said five years and then cut it down to three years.

Mr. Bickle told him he wasn't empowered to do that, he had to go back to St. Louis to discuss it further.

There was some other areas of discussion as to how to merchandise the place in the coming years. I don't remember if there was discussion on the maintenance or not. To tell you frankly, we have been talking about this so much that one conversation leads into another, and I really don't remember accurately.

Q When you say you have been talking about it so much, on June 26, 1975 you spoke with me at my office; isn't

that correct?

A Yes.

Q And you have spoken with other attorneys in connection with this case as well?

A Yes.

Q And you are represented by counsel here today; is that correct?

A That is right.

Q Mr. Sherman, in its totality, I would like you to tell me the best of your recollection today as far as everything that was said at that particular meeting which took place during the summer of 1974 attended by Messrs. Tolve, Clements, Bickle, Thurman and yourself.

A Let me say this: During that meeting not only was I attending the meeting, but the people were having coffee and Danish and I kept getting up and back bringing coffee and refreshments to the table and I missed a lot of what was going on.

THE COURT: Was it toasted Danish?

Q Other than the Danish, Mr. Sherman, do you recall what else happened during the course of that meeting?

A A conversation mainly between Mr. Tolve and Mr. Bickle on various aspects of operating the Swiss House, maybe tying it in with the bicentennial and again to repeat

myself, the length of the contract was discussed. I think the rental was discussed. I am not absolutely clear in my mind as to all the details of that particular meeting.

Q Mr. Sherman, you mentioned that one of the items that was discussed was the question of the rental.

A I think it was discussed.

Q Do you recall whether any particular number or percentage was agreed upon with respect to the rental?

A I don't know. As a matter of fact, I don't think anything was really agreed on. After the conversations were over Mr. Bickle I think said he was going to put everything in writing and send it to Mr. Tolve.

Q Did Mr. Bickle during the course of the meeting while you were present, Mr. Sherman, state that Busch was willing to enter into an agreement with Restaurant Associates providing for the continued management by Restaurant Associates of the Old Swiss House for a period of two years?

A I don't remember how it was put. I do remember Mr. Bickle saying that he did not have the authority to approve an agreement for three years.

Q Isn't it a fact that at the conclusion of that meeting Mr. Tolve and Mr. Bickle shook hands upon an agreement that Restaurant Associates would continue to manage the Old Swiss House for a period of two years beyond November 4, 1974?

A I am sure they shook hands when they left, but what the meaning of the handshake, I can't interpret.

Q Was there also discussion at that meeting relative to the fast food operations?

A There may have been. I don't remember.

Q You don't recall?

A I am not sure, no.

Q Do you recall whether during the course of that meeting it was agreed that Restaurant Associates would turn over the management and operation of the fast food facilities other than the Old Swiss House to Busch on November 4, 1974?

A I think that was a conclusion reached even before then.

Q Do you recall it being discussed at the meeting?

A I don't remember any discussions about the snack bars at the meeting.

Q Do you recall there being discussion at that meeting, Mr. Sherman, of the union contract covering the employees, the Restaurant Associates employees at Busch Gardens?

A Discussion of the contract in total? I don't understand the question.

Q A discussion, sir, of the contract itself, the date it was going to terminate and what things were going to

happen the day that it terminated.

A I don't know whether we discussed that or not. I don't think we did.

Q Thereafter, after that meeting, did you receive a copy of the attachment to Plaintiff's Exhibit 6, and I show it to you?

For the record, it's a draft agreement relating to the Old Swiss House.

A I don't think I received this. What I did receive I think was a list of changes to the agreement. I don't remember receiving the agreement.

Q Do you recall receiving anything from Leonia Bernstein of Restaurant Associates relative to any new agreement with Busch for the continued operation of the Old Swiss House?

A I think it was a list of changes.

Q Did Miss Bernstein, and by the way she is one of the counsel for Restaurant Associates, solicit any requests from you with respect to what should be put into the contract or review the contract provisions?

A She didn't specifically solicit anything from me. One day Mr. Clements was in the Swiss House office talking with Lee Bernstein, with Miss Bernstein on the telephone with regards to the contract and he was discussing these

things, and he asked me for certain suggestions which I believe I made.

Q But is it your testimony that you then never received a copy of Plaintiff's Exhibit 6, not referring now to the letter but referring to the draft agreement?

A I don't think I have this. I think I did see a copy of the proposed changes.

Q But you did communicate with Miss Bernstein, did you not, Mr. Sherman, relative to certain provisions you thought should be included in the new written agreement between Busch and Restaurant Associates?

A I don't think I communicated directly with her. I think I did it through Mr. Clements.

Q You have no recollection of communicating directly with Miss Bernstein in connection with the new agreement?

A Right.

Q I show you a letter dated October 10, 1974, and ask if it bears your signature, sir.

A Yes, that is mine.

MR. SCHAEFFER: Your Honor, I would offer that letter in evidence as Plaintiff's Exhibit 14.

THE COURT: Received.

xxx (Plaintiff's Exhibit 14 received in evidence.)

Q Isn't it a fact by the terms of that letter you suggested to Miss Bernstein that a certain provision be put into the contract of a noncompete type of clause to characterize it?

A Yes.

Q Between the period from the date of this July 1974 meeting which you aren't sure of and November 4, 1974, did Restaurant Associates continue to operate and manage both the Old Swiss House and the fast food facilities at Busch Gardens?

A Yes, they did.

Q And during that period of time, Mr. Sherman, were you in communication with Mr. Bickle of Busch? Did you speak with him?

A Yes, sure.

Q Did Mr. Bickle -- by the way, during that period of time were you in communication with Mr. Thurman as well?

A Not much. Very rarely.

Q Between July 30, 1974 and November 4, 1974 were you in communication with Mr. Long?

A Also very rarely. Occasionally but very rarely.

Q Between those two dates, Mr. Sherman, July 30, 1974 and November 4, 1974, did Mr. Bickle ever tell you in writing or orally that Busch had determined to terminate the relationship with Restaurant Associates at Busch Gardens?

A What date was that?

Q Between the date of the July meeting in 1974 that you have testified about and November 4, 1974.

A No.

Q Did Mr. Long in the communications that you had with him, written, oral or otherwise, ever tell you or suggest to you that Busch had chosen to terminate its arrangement with Restaurant Associates at the Old Swiss House, between July 30th, between the July meeting of '74 and November 4, 1974?

A No, sir.

Q Did any employee, director, officer of Busch between July 30th or the date of the July meeting in 1974 and November 4, 1974 express to you either in writing or orally that Busch had chosen to terminate its relationship with Restaurant Associates at Busch Gardens?

A No.

Q On November 4, 1974, Mr. Sherman, the operation and management of the fast food facilities at Busch Gardens were transferred to Busch; is that correct?

A Yes.

Q Was that pursuant to an agreement which had been reached previously between Restaurant Associates and Busch?

A Yes.

Q Is it not a fact that as part of that agreement Busch had undertaken to keep Restaurant Associates in control of the management and operation of the Old Swiss House for a period of at least two years from November 4, 1974?

MR. KHEEL: I object to that question.

THE COURT: Sustained.

Q Mr. Sherman, prior to November 4, 1974 Restaurant Associates had employees, did it not, both in the Old Swiss House and in the fast food facilities?

A That is right.

Q Were all of those employees members of a union?

A No.

Q Were all of the employees who are employed by Restaurant Associates at Busch Gardens covered by a union contract?

A Yes.

Q Do you know the date that that contract terminated on?

A November 4th.

Q 1974?

A Yes.

Q What was done with the employees of Restaurant Associates who worked in the fast food facilities on that date?

A The union employees were transferred over to the Swiss House.

Q And when Busch commenced its direction, management and operation of the fast food facilities the employees of those facilities were not union members; is that correct?

A Correct.

Q Did you on behalf of Restaurant Associates, Mr. Sherman, enter into a new contract with the union?

A Yes.

Q Do you recall the date that you entered into that contract, that extension agreement?

A It was a two-year contract until November 4, 1976, I guess it is.

Q If I show you Plaintiff's Exhibit 8, would you be able to tell me the date that you signed this agreement on behalf of Restaurant Associates?

A December 3rd.

Q 1974?

A Yes.

Q And that contract was to expire by its terms on November 4, 1976?

A Right.

Q And that applied to the employees of the Old Swiss House?

A Yes.

Q All of them?

A Yes, although they are not all members of the union but it covers all of the employees.

Q And prior to signing that agreement, Plaintiff's Exhibit 8, on behalf of Restaurant Associates, did you have discussions with superior employees, with Mr. Clements, with Mr. Tolve, with Miss Bernstein, relative to the fact that you were going to be entering into an extension agreement with the union?

A I don't think I spoke with Miss Bernstein, but I think I spoke with Mr. Klepper.

Q Is Mr. Klepper a lawyer for Restaurant Associates?

A Yes.

Q Is he executive general counsel of Restaurant Associates?

A Yes.

Q Prior to signing that agreement on December 3, 1974, Mr. Sherman, did you have conversations relative to your entering into that agreement with employees, officers or directors of Busch?

A I don't believe so.

Q Can you tell me who is in charge of the operations of Busch Gardens for Busch, or who was in charge of

operations at Busch Gardens for Busch as of November 1974?

A Are you speaking of the manager of Busch Gardens?

Q That is correct.

A His name is Joe Fincher.

Q Did you speak with Mr. Fincher prior to December 31, 1974 and tell him that you were going to be entering into an extension agreement with the union?

A It's possible I did. I don't remember.

Q Do you remember whether you spoke with any other employees of Busch prior to entering into the December 31, 1974 extension agreement relative to that agreement?

A I may have but I don't remember whether I did or not.

Q Mr. Sherman, prior to May 1st, 1975 did Mr. Bickle ever inform you in writing or otherwise that Busch had chosen to terminate its relationship with Restaurant Associates?

A Prior to May 1st?

Q Yes.

A I am not positive about the date, but I would have to say no if it's prior to May 1st.

Q Prior to May 1st, 1975 did Mr. Long communicate with you in writing or otherwise and inform you that Busch had chosen to terminate its relationship of the Old Swiss House with Restaurant Associates?

A No, sir.

Q And prior to May 1st, 1975 did any employee of Busch, including August Busch, III, inform you that Busch intended to terminate its arrangement with Restaurant Associates?

A No, sir.

Q And between the date of the July 1974 meeting and May 1st, 1975 did any employee of Busch inform you that they were dissatisfied with the operation of the Old Swiss House by Restaurant Associates?

A No, sir.

Q And in fact you received letters from Mr. Busch, did you not, relative to the relationship which existed between Busch and Restaurant Associates at Busch Gardens?

A I received one letter from him I think.

Q I show you a letter dated October 21, 1974, and ask if you received that letter from August A. Busch, III.

A Yes, I did.

MR. SCHAEFFER: I offer that letter into evidence as Plaintiff's Exhibit 15.

xxx (Plaintiff's Exhibit 15 received in evidence.)

Q You received Plaintiff's Exhibit 15 from Mr. Busch?

A Yes, of course.

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Q By the way, Mr. Sherman, after November 4, 1974 RA continued to manage and operate the Old Swiss House as it had prior to November 4, 1974?

A Correct.

Q And continues to this day in management and operation of the Old Swiss House?

A Right.

Q And you continue as general manager of the Old Swiss House?

A Yes.

Q I show you a letter dated January 21, 1975 from a Mr. Long, and ask you if you received that letter.

A Yes.

MR. SCHAEFFER: I offer this letter dated January 21, 1975 from Dennis B. Long to Mr. Sidney Sherman as Plaintiff's Exhibit 16.

xxx (Plaintiff's Exhibit 16 received in evidence.)

Q Mr. Sherman, would it be fair to say that between the time you arrived at Busch Gardens as manager for Restaurant Associates in January of 1974 through May 1st, 1975 there were no complaints made to you of a serious nature by any employee of Busch relating to the management and operation of Busch Gardens by Restaurant Associates?

A In the entire time that I was there?

Q Yes.

A No, that is not a fair statement.

Q Would it be a fair statement that between July 1974, the time of the meeting which you testified about, and May 1st, 1975 there were no complaints of a serious nature made by the Busch people relative to the management and operation at Busch Gardens by Restaurant Associates?

A Well, the one serious complaint we had, and I can't pinpoint the date, but the letter I got from Mr. Busch, III was a follow-up letter from the time he was in the Swiss House and made an inspection of the premises and was very unhappy with the condition of the place as far as cleanliness was concerned.

Q Do you recall the date of that?

A It was before that letter. On his next vitit I then had the place all cleaned up and to his satisfaction, and that was the reason for that letter.

Q On the date of that first visit were you the general manager of the Old Swiss House at that time?

A Yes.

Q And you were general manager of the Old Swiss House on the second occasion as well?

A Yes.

Q And he was satisfied on the second walk through?

A Yes.

Q Did there come a time, Mr. Sherman, that you received a telephone call from Mr. Bickle in May of 1975 during the course of which he informed you at least in part that Busch had elected and chosen to terminate its relationship with Restaurant Associates at Busch Gardens?

A Yes.

Q Can you tell me the date of that telephone call?

A It was the early part of May. I don't remember the exact date.

Q Did you prepare a memorandum in connection with that telephone call?

A No, I did not.

Q It was early May 1975?

A Maybe the first week or the second week. It was about the first week or maybe ten days into the month. Had I known I had to keep records on this thing, that it would come to something like this, perhaps I might have kept records. But I didn't envision this.

Q Can you tell me where you were when you received the telephone call?

A The Swiss House.

Q By the way, I assume you were the one that received

the telephone call; is that correct? Did you receive the phone call or did you make the phone call?

A I received it.

Q Do you know where Mr. Bickle was when he made the telephone call?

A I am not 100 percent sure. I will assume he was in St. Louis.

Q Can you tell me everything that Mr. Bickle said to you during the course of that telephone conversation and everything that you said to him?

A Mr. Bickle told me that he had orders from upstairs to terminate the association with Restaurant Associates and he would like me to manage the place for them, and when I hesitated about it he said, "Look, Sid, if it's not you, it's going to be somebody else. Mr. Clements and Mr. Tolve know we have other people looking at the place, so make up your mind now. If it's not you, it surely is not going to be Restaurant Associates."

He put it so strongly that RA was going to be out and if I didn't decide to manage for them, they would have another company in, that is when I decided to accept.

Q And you accepted during the course of the telephone conversation?

A Verbally, yes.

Q By the way, was there anybody else on the telephone during that telephone conversation or was it just you and Mr. Bickle?

A I think it was just the two of us.

Q Were you aware as of the date of that telephone conversation that other people or other entities or other companies were looking at the Swiss House in connection with entering into a management agreement with Busch?

A We were all aware of it for quite sometime.

MR. SCHAEFFER: I ask that the witness be directed to answer the question I have asked, whether he was aware of it.

THE COURT: You didn't let him answer. You interrupted him. You have to wait until he answers his way, not your way.

(Question read.)

THE COURT: That calls for a simple affirmative or negative. Were you aware?

THE WITNESS: That is a little complicated question, your Honor. The people looking at it, I don't know whether they were looking to enter into management agreements. I do know there were other companies looking at the -- interested in the Swiss House.

Q Which other companies as of that date were you

aware were interested in the Swiss House?

A I couldn't give you the names. I don't know.

Q How did you become aware of their interest in the Swiss House?

A Sometime in the past there were quite a few businessmen suddenly on the scene having dinner and going around the place and so on, and it became apparent to me that they were people in the restaurant field looking at the place, and of course I reported that to my supervisor Mr. Clements and I think he or Mr. Tolve, I don't remember, someone called that to the attention of the Busch people and there was some conversation about that in the past.

Q Do you recall when those events or when those conversations transpired?

A Some months back.

Q Do you recall the month?

A No, I am not sure.

Q At the time of those observations which you made did you dictate or write a memorandum to Mr. Clements or Mr. Tolve or any of your superiors at Restaurant Associates relative to your observations of seeing other persons looking at the operation?

A I don't think I sent a memorandum. I think I just told it to him.

Q Your initial conversation, Mr. Sherman, with Mr. Bickle in May of 1975, did you tell Mr. Bickle in that conversation that it was your understanding that Restaurant Associates was to continue to operate and manage the Old Swiss House until November 1976?

MR. KHEEL: I object to the form of the question.

THE COURT: Overruled.

Did you tell them that?

(Question read.)

A I don't think I told that to Mr. Bickle.

Q Did you say anything to Mr. Bickle relative to an agreement between Restaurant Associates and Busch for the continued operation of the Swiss House?

A First let me say this: Our initial conversation didn't take place in May. Our initial conversation took place perhaps a year ago when I was approached by Mr. Bickle to come to work for them as manager of the Swiss House because they were a little worried -- when I first arrived at the Swiss House there were many problems in there. The place was --

MR. SCHAEFFER: Your Honor, to the extent the answer is not responsive --

THE COURT: Yes. Go ahead with the next question.

Q Mr. Sherman, during your conversation with

Mr. Bickle, the telephone conversation in early May 1975, did you say anything to Mr. Bickle relative to an agreement or, as you understood the agreement to be, between Restaurant Associates and Busch for the continued operation and management of the Old Swiss House?

A I don't believe I did. I don't remember whether I did or not. I don't think I did.

Q Did he say anything to you?

A The conversation we had relative to the contract that there was no agreement.

Q I am sorry?

A Whatever conversation Mr. Bickle and I had or whatever Mr. Bickle told me about any agreement between RA and Anheuser-Busch was that there was no agreement.

Q Who said that to whom?

A I didn't say that. I think Mr. Bickle told that to me.

Q Could that have been during the phone conversation?

A It might have been that or a subsequent phone conversation. I am not sure.

Q In answer to a question a few moments ago you stated that you had had a conversation with Mr. Bickle perhaps a year before that May 1975 telephone call; is that correct?

A Yes.

Q During the course of the conversation Mr. Bickle asked you to come to work for Busch?

A Yes.

Q Did you refuse to do so?

A Yes.

Q But during that May 1975 telephone conversation you agreed to go to work for Busch; isn't that correct?

A That is correct, because I had reasons --

MR. SCHAEFFER: Your Honor --

THE WITNESS: I have reasons for saying things.

THE COURT: That is correct.

There are some lawyers who want to see me. I will see them in chambers.

(Recess.)

BY MR. SCHAEFFER:

Q During the course of that first telephone conversation with Mr. Bickle in early May 1975, did he offer to pay you more money than Restaurant Associates was presently paying you?

A My salary at Restaurant Associates did not only include money, it included other things that I gave up. It would be hard for me to judge at this moment.

Q How much did Mr. Bickle offer to pay you?

A My fee was to be $40,000 per year plus a percentage of profits.

Q How much was Restaurant Associates paying you?

A Restaurant Associates, I received for the last year $31,000. My salary plus my bonus plus a pension plan, life insurance policy, major medical and so on which I do not have now, which I will have to go out and buy on my own now.

Q Over and above the $40,000 compensation which Busch or which Mr. Bickle told you Busch would pay, there was also a question of a percentage of net operating practice; is that correct?

A That is correct.

Q During that first conversation, Mr. Sherman, did Mr. Bickle tell you whether or not he had spoken with Restaurant Associates and told Restaurant Associates he was going to be calling you and offering you this job?

A Mr. Bickle was going to call RA? Are you asking if Mr. Bickle told me he was going to tell RA?

MR. SCHAEFFER: Read the question back.

(Question read.)

A No, he didn't tell me that. As a matter of fact, I insisted in our conversation with Mr. Bickle that I have the opportunity to report what is happening to Restaurant Associates before we made any agreements.

Q Did Mr. Bickle inform you then that he had not been in touch with Restaurant Associates to inform them that he was going to be making this offer to you?

A He didn't inform me. That didn't come up in the conversation at all.

Q Did you assume during the course of that conversation that Mr. Bickle had not been in touch with Restaurant Associates to inform them of this offer?

A That is right.

Q Upon getting off the telephone that day did you then call Mr. Clements and inform him of the offer that had been made that day?

A Not exactly that day, no.

Q Did you call Mr. Tolve and inform him that day of the offer that had been made?

A No, sir.

Q How about the following day, did you call Mr. Tolve or Mr. Clements or any of your superiors at Restaurant Associates and tell them that an offer had been made by Busch and that you had elected to accept that offer?

A No, I did not tell them that.

Q Can you tell me the ver first date upon which you told either Mr. Clements or Mr. Tolve that an offer had been made by Busch for you to manage the Old Swiss House and that

you had accepted it?

A It had to be about the first week in June.

Q So between the time of Mr. Bickle's telephone call during the first week or the fir. . ten days of May 1975 and the first week in June you had not informed Restaurant Associates or any officer, employee of Restaurant Associates that you had been made the offer or that you h. accepted it?

A Because I had not yet received a contract. I had not yet received a signed contract from Anheuser-Busch until about the 3rd or so of June.

Q So that it was after you entered into a written agreement, Plaintiff's Exhibit 13 in evidence, that you first informed Restaurant Associates that you had been made an offer and that you had accepted it; is that correct?

A Yes, that is correct.

Q And you had a meeting, did you not, with Mr. Bickle in Tampa, Florida after the telephone conversation that you have been testifying about? Did you have a meeting with Mr. Bickle in Tampa?

A I think so.

Q Was the purpose of that meeting to discuss the terms of the contract you were going to be entering into with Busch?

A Yes.

Q Do you recall the date of that meeting?

A No, I am sorry, I don't.

Q Do you recall the approximate date of that meeting?

A I take a guess around the 12th of May or 13th of May.

Q It was after the first telephone call, was it not?

A Yes.

Q During the course of that meeting -- how long did that meeting last, by the way, Mr. Sherman, approximately?

A Not very long.

Q An hour?

A Maybe an hour.

Q Did you discuss the terms of the contract?

A Yes.

Q Did you have a lawyer with you at that meeting?

A No, I did not.

Q Did Mr. Bickle have a lawyer with him at that meeting?

A He had somebody. I don't know if he was an attorney or not.

Q Was Mr. Carpenter with him, T. Michael Carpenter?

A I am not sure if he was at that meeting. He may have been at the meeting.

Q Is Mr. Carpenter in the courtroom today?

A Yes.

Q Is Mr. Carpenter, to your knowledge, one of the attorneys on the staff of Anheuser-Busch?

A Yes. Yes, I think he was there.

Q He was present at the meeting?

A I believe so.

Q Did he participate in the discussion, the give and take, that took place at that meeting?

A Yes.

Q You had suggested that an approximate date for this meeting was approximately May 12th --

A I may be all wrong on the date. I didn't keep any records.

Q When you met with Mr. Bickle and with Mr. Carpenter for that meeting, did Mr. Bickle or Mr. Carpenter tell you that either they or other representatives of the Busch Company had or had not been in touch with Restaurant Associates to inform Restaurant Associates of the offer that was being made to you and the acceptance of your offer?

A There was no discussion as to whether they informed anybody.

Q Did you assume that they had not?

A Yes.

Q Your direct supervisor within Restaurant Associates

is Mr. Clements?

A Yes.

Q And above Mr. Clements Mr. Tolve?

A Right.

Q Did you inform Mr. Tolve or Mr. Clements of the meeting which took place on or about May 12, 1975 between yourself, Mr. Carpenter and Mr. Bickle?

A No, I did not inform them of that meeting.

Q It was not until the first week of June 1975 that you had informed them of your having accepted an offer with Busch; is that correct?

A It was before that that I told Mr. Clements that I accepted the offer but I told him I had not yet received a written contract.

Q But after the meeting now that took place on or about May 12, 1975 did you contact either Mr. Tolve or Mr. Clements to inform them either of the meeting or of the offer that had been made or the fact that you had accepted it?

A After what date?

Q May 12, 1975.

A In one conversation with Mr. Tolve I think Mr. Tolve called me. When Mr. Bickle told me they were going to meet with Mr. Tolve the following week or whenever the date

was.--

Q Let me interrupt you. Did Mr. Bickle tell you that over the telephone?

A He told it to me over the phone, yes.

Q And that was in a telephone conversation that took place after your meeting with Mr. Bickle and Mr. Carpenter in Florida; isn't that right?

A That is right.

Q Let's stay with that meeting for one moment. When you left that meeting or when Mr. Bickle and Mr. Carpenter, his lawyer, left that meeting, did Mr. Bickle tell you that he would be sending you a written agreement in the mail?

A No, he had something typed up that day and handed it to me.

Q He handed it to you?

A Yes.

Q He asked you to review it?

A Yes.

Q Did you subsequently take that instrument to a lawyer?

A Yes.

Q Do you have that instrument with you, the original instrument that was given to you by Mr. Bickle on or about May 12, 1975?

A No, I mailed it back to him.

Q The very same document?

A Right.

Q Isn't it a fact, Mr. Sherman, that you received an unsigned agreement in the mail at your home from Anheuser-Busch relating to your employment and not at the meeting that took place on or about May 12, 1975?

A No, that is not so.

Q Is it your testimony that the contract was given to you on May 12, 1975?

A I don't remember the date but it was handed to me in person not in the mail. The final signed contract I got in the mail.

Q. At your home?

A Yes.

Q Did you see Mr. Bickle between the date of this meeting which took place on or about May 12, 1975 and the time that you received an executed copy of that contract signed by Mr. Long?

A I don't think I saw him. I don't believe so.

Q Can you tell me who gave you the written agreement?

A He did.

Q Did he give it to you at the meeting on or about May 12, 1975?

A Right.

Q Did you sign it right there?

A No.

Q Did you take it to a lawyer?

A Yes.

Q Is that Mr. McLean?

A Yes.

Q Did you make any changes in the agreement?

A A few little changes that you will see. They are right on the agreement there.

Q Did you thereafter cause a corporation to be formed under the laws of the State of Florida?

A Yes.

Q Can you tell me the name of that corporation?

A Sherman Management Corporation.

Q Inc.?

A Yes.

Q Do you recall the date that you formed this corporation in the State of Florida?

A I believe it was the last day of the month of May. The end of the month of May.

Q Do you recall signing the articles of incorporation of that corporation?

A Yes.

Q Do you recall the date that you signed the articles of incorporation?

A No, but it was towards the end of May.

Q I show you this document, Mr. Sherman, and ask if it bears your signature.

A Yes.

Q Is that your signature?

A Yes.

Q Is that the signature of your wife Shirley Sherman?

A Yes.

MR. SCHAEFFER: At this time plaintiff offers as Exhibit 17 the certificate of incorporation of Sherman Management Corporation, Inc., a Florida corporation. I give to the Clerk of the Court a certified copy of that certificate of incorporation.

xxx (Plaintiff's Exhibit 17 received in evidence.)

Q Did you cause this corporation to be formed for the purpose of entering into the agreement with Anheuser-Busch?

A Yes.

Q Did you cause it to be formed on May 15, 1975?

A I don't remember the date.

THE COURT: This was filed May 30th.

MR. SCHAEFFER: I also note on the last page,

your Honor --

THE COURT: You don't form a corporation when you sign a paper. You form a corporation when you file it in an official place.

MR. SCHAEFFER: I appreciate that, your Honor.

Q Mr. Sherman, after your meeting with Mr. Bickle and Mr. Carpenter on or about May 12, 1975 did you receive a subsequent telephone call from Mr. Bickle?

A Yes.

Q Did Mr. Bickle tell you during that subsequent telephone conversation that he had made arrangements to meet with Mr. Tolve in New York?

A Yes, he did.

Q Can you tell me what else Mr. Bickle told you during the course of that telephone conversation?

A He simply told me he was going to meet with Mr. Bickle -- Mr. Bickle was going to meet with Mr. Tolve for the purpose of ending our association.

Q When you say our, you mean RA's association with Busch?

A Yes.

Q Had you already arranged a meeting?

A He said he had an appointment, yes.

Q Do you recall the date that you had that telephone

conversation with Mr. Bickle?

A I don't remember the exact date but it was the same date, as soon as he called me I called Mr. Clements and informed him of what was happening.

Q What did you tell Mr. Clements?

A Just what Mr. Bickle told me.

Q Which was?

A He had a meeting with Mr. Tolve and the conversation went something like this: I said, you know what the meeting is for, don't you, and Mr. Clements said, our demise, and I said yes, that is it.

Q Was there anything else said during the course of that telephone conversation?

A Not too much.

Q Did you tell Mr. Clements during the course of that telephone conversation that Busch had made an offer for you to manage the Old Swiss House?

A No, although I did tell it to him months back.

Q You are now referring to an incident that took place a year before that?

A That is right.

Q When you refused to go to work for Busch?

A Right.

Q But on that day, the day Mr. Bickle called you and

told you he had an appointment with Mr. Tolve, you testified you called Mr. Clements?

A Right.

Q Mr. Sherman, you called Mr. Clements after you received the telephone call from Mr. Bickle. Did you tell Mr. Clements during the course of that telephone conversation that Mr. Bickle had made an offer on behalf of Busch to you for you to manage the Old Swiss House in place of Restaurant Associates?

A No, I did not.

Q Did you tell Mr. Clements that you had decided to accept an offer and to replace Restaurant Associates as manager of the Old Swiss House?

A Not at that time.

Q Did you tell Mr. Clements that you were forming a corporation for the purposes of taking over the management and operation of the Old Swiss House from Restaurant Associates?

A No, I did not.

Q Isn't it a fact, Mr. Sherman, that during the course of your conversation with Mr. Clements that day he asked you to remain uncommitted and not to commit yourself to Busch?

A Yes, he did.

Q Isn't it a fact, Mr. Sherman, that Mr. Clements

said to you that this was a ploy that they often had with Busch that Busch had done this before and that if you remained firm, that Restaurant Associates would be able to continue the relationship with Busch?

A No, they did not say that. As a matter of fact, my reason for notifying them was in the hope that they could somehow work it out among themselves.

Q By this time you had reached an agreement with Busch for yourself?

A I had agreed to, yes.

Q And you had a contract in your hands?

A No, I did not.

Q Wasn't it a fact and haven't you testified that on May 12, '75 you had been given a written agreement --

A Not signed, just a blank contract.

Q By the time that you called Mr. Clements had you sent it back to St. Louis?

A I sent it back about the 20th of May.

Q So you had not as yet received it from St. Louis?

A Correct.

Q But you had signed it and sent it?

A Yes.

Q That contract was sent to you not at the Old Swiss House but it was sent back to you at home?

A Right.

Q Mr. Sherman, you have reviewed the contract which you signed, Plaintiff's Exhibit 13 in evidence?

A Yes.

Q You reviewed it before you signed it. Can you tell me do you have the same duties under this contract that Restaurant Associates had under its agreement with Busch for the operation of the Old Swiss House?

A I have the same duties, yes.

MR. SCHAEFFER: For the purposes of a number of questions I would like the witness to have the document in front of him. I only have one copy myself.

Q Looking to the preamble which appears on page 1 of that document agent is engaged in the business of manag ag restaurant and food and beverage operations and of offering consultation services with respect thereto.

Can you tell me the date that you signed this agreement?

A On the 20th of May.

Q On the 20th of May?

A Yes.

Q Who was the agent on the 20th of May?

A Restaurant Associates.

Q Under the terms of your agreement with Busch who

was the agent on the 20th of May?

A Restaurant Associates.

Q Mr. Sherman, when you originally started negotiating or discussing the possibility of working for Busch, was it originally agreed that you would personally, Sidney Sherman, would be the agent of Busch in managing and operating the Old Swiss House?

A Yes.

Q It was only thereafter that it was decided, I assume by you, that it would be a corporation instead?

A Yes.

Q Looking to the term of the agreement on page 8, the term was to expire on November 4, 1977.

A Correct.

Q Was that to coincide with the date of the union agreement?

A Yes.

Q Looking to article --

A Our union agreement only goes to '76, not to '77.

Q Looking to article 19 on page 12, agreement not to compete, not to operate a restaurant or in any other way with or aid a competitor of principals within a radius of 20 miles of the restaurant during the term of this agreement --

A Yes.

Q Was the term of this agreement pursuant to VII on page 8 to commence on June 15, 1975?

A We had verbally agreed to July 1st.

Q Does the agreement provide for a commencement date of June 15, 1975?

A Yes, it does.

Q Were there any other verbal agreements between you and Busch in connection with this agreement? Had there been any verbal modifications of this agreement?

A No.

Q Other than as to the commencement date?

A Right.

Q And you are presently employed by Restaurant Associates?

A Yes.

MR. SCHAEFFER: I have nothing further.

CROSS-EXAMINATION

BY MR. KHEEL:

Q Mr. Sherman, I just have a few questions, I hope.

Prior to May 1, 1975 had you on any occasion indicated to Mr. Clements or other representatives of the plaintiff that for personal reasons you did not wish to leave Tampa, Florida?

A Yes.

Q Could you tell me what you told Mr. Clements on those occasions?

MR. SCHAEFFER: I object. I don't see the relevance.

THE COURT: It's highly relevant but it's not competent.

Q Mr. Sherman, do you have any personal reasons for why you wish to stay in Tampa?

A Yes.

Q Would you tell the Court what the personal reasons are?

MR. SCHAEFFER: Objection.

THE COURT: Overruled.

A I came down to Florida January of 1974. For the first six months of our stay my wife was mentally depressed, very lonesome. At that time in order to get the restaurant in shape I was working seven days a week without a day off. I would come home every night and find my wife walking around the streets crying.

THE COURT: Let's leave it that you had sufficient personal reasons for wanting to stay in the South. Go on to something else otherwise I will have a family expose here.

Q Prior to May 1st, 1975 had you indicated to any representatives of Busch your personal reasons for wishing

to stay in Tampa, Florida?

A I don't know whether I gave them that reason, but I told them I was in Florida to stay and I would not go back to New York.

Q During 1974 did you have a conversation with Mr. Bickle concerning the subject of Busch's concern about the possibility that you might leave Restaurant Associates?

A Yes, I did.

Q Can you tell me as best you can recall when that conversation occurred and what was said in connection therewith?

A I think it took place somewheres in the middle of the year.

THE COURT: What year?

THE WITNESS: 1974. I very strongly assured Mr. Bickle that I had no intentions of leaving Tampa or the Old Swiss House. Mr. Bickle and the Busch people were a little concerned that I might be transferred out and they might wind up with a manager similar to the one they had before me which they were very unhappy with.

I did everything possible to convince Mr. Bickle and everyone else who would listen to me that I had no intentions of leaving. I wanted to stay with the Old Swiss House. I liked it there and I also enjoyed working for

Restaurant Associates.

So they had no concern. If they renewed the contract with RA, there was no problem about anybody transferring me out to another area because I told them I wouldn't go if one of my supervisors wanted to transfer me.

Q Can you tell me whether during the 18 months you have been at Old Swiss House Busch has made it clear that they are very particular about the quality of the operations there?

A There is no question about that, yes.

Q Earlier on your direct testimony a document which has been marked Exhibit 14 in evidence, which appears to be a copy of the letter you sent to Miss Lee Bernstein with a copy to Mr. Tolve, do you recall that letter?

A I have to look at it.

Q Did you send a copy of this letter to anyone at Anheuser-Busch?

A No.

Q Have you ever discussed with Anheuser-Busch the subject matter of this letter?

A I don't believe I have.

MR. KHEEL: No further questions, your Honor.

REDIRECT EXAMINATION

BY MR. SCHAEFFER:

Q Mr. Sherman, were you not assured on numerous occasions between January 1st, 1974 and June of 1975 that Restaurant Associates, your employer, would keep you in Florida, in one of their facilities in Florida?

A I was not insecure about that.

Q You were not?

A No. It's not just a question of Florida. I just could not pick up my wife and move her, make that major move again as we did from New York to Tampa.

Q Are you familiar with the fact that Restaurant Associates manages and operates the facilities at Cypress Gardens in Florida?

A Yes.

Q And Cypress Gardens is within 50, 60 miles of Tampa?

A Yes.

MR. SCHAEFFER: I have no further questions.

THE COURT: Have you ever had any written contract of employment or management with Restaurant Associates?

THE WITNESS: No, sir.

THE COURT: Did you have any obligation that tied you to Restaurant Associates in June of 1975?

THE WITNESS: No, sir.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Next witness.

MR. MENSCH: Joseph Kayata.

J O S E P H K A Y A T A, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MENSCH:

Q Are you employed by Restaurant Associates?

A Yes, I am.

Q Do you have a title?

A Vice president and controller.

Q As such what are your duties?

A I maintain or I am responsible for maintaining the books and records of the corporation and preparing financial statements for the board of directors, the SEC, et cetera, stockholders.

Q Are the financial statements, the operating statements that are sent by Restaurant Associates to Anheuser-Busch concerned with the operations at Busch Gardens prepared under your supervision?

A Yes.

Q And Restaurant Associates, to your knowledge, have sent them continuously to Busch over the period from 1969 if they were operating at Busch Gardens?

A Yes.

Q Do you have copies of those statements with you?

A Yes, I have.

MR. MENSCH: Your Honor, I should like to offer a schedule which is a summary of those statements in order to avoid the burden of putting them all in.

THE COURT: What is the purpose of the offer?

MR. MENSCH: Several. In the first place, but not the most important, we allege that this is a matter that involves in excess of $10,000 and, secondly, there has been some testimony here that reflects on the profitability of the fast food operations.

THE COURT: I don't think you need to address yourself to that subject. That is not relevant to the issue of whether you are entitled to a preliminary injunction.

MR. MENSCH: The third matter is that this summary, which is simply an arithmetical processing of the numbers that appear on these financial statements indicating the significance of the matter in dollars and I submit, your Honor, that it's significant from that point of view.

THE COURT: What you are saying to me is that the breach that you allege is compensable in dollars and that this will aid in that chore.

MR. MENSCH: Not at all.

THE COURT: Then why are you offering them if it's not compensable in dollars?

MR. MENSCH: The offer is being made to demonstrate to the Court that what is involved here is a very substantial matter.

THE COURT: Substantial dollars.

MR. MENSCH: The profits are substantial. Profits are earned for Restaurant Associates through the management of the operation. The argument from that is that that management is a personal one. When that is removed, it's going to be very difficult to determine what the dollar damages should be for the breach that is unquestionably involved here.

THE COURT: The fact that there is difficulty in determining damages under the rule of Big O against RKO is a concern of a tort-feasor or a contract breaker not your concern.

MR. MENSCH: It also goes to the propriety of granting injunctive relief under the cases.

THE COURT: I think under the cases you are proving too much. You are attempting to prove that there is no irreparable damage. That is all I get out of your offer. The fact that there are large dollar signs involved doesn't afford you any equitable basis for relief. The law seems to

be rather clear under those circumstances if indeed there was a breach.

MR. MENSCH: The argument, your Honor, is that what is involved here is a unique facility in a unique location --

THE COURT: That is a different subject which has nothing to do with how much money is involved. I will let you do this: I think that it's irrelevant to the issue of whether or not the equities favor an injunction assuming that you have a contractual right here, but in order to let you establish what you say the magnitude is and without prejudice to a trial on final submission you may offer the schedule that you have prepared subject to such correction and modification as may be appropriate at another time.

By what I have just indicated to you it should now be clear to you that this hearing for a preliminary injunction will not be converted into a final trial on the merits.

MR. MENSCH: I understand that, your Honor. With this offer I have no further questions from Mr. Kayata.

THE COURT: You may present it and in view of the fact that it's offered for the purposes indicated, I assume that the defendant has no present objection.

MR. KIBEL: That is correct, on the terms you set forth, your Honor.

THE COURT: It may be marked.

MR. MENSCH: The invitation is that these numbers are subject to check and if they are inaccurate or incorrect, they will be modified.

THE COURT: It goes beyond that. I am not talking about whether you can add or subtract properly. I am talking about whether the items are relevant and compensable in terms of damages.

xxx (Plaintiff's Exhibit 18 received in evidence.)

MR. KHEEL: May we request a copy at some point?

THE COURT: I will have the Clerk of the Court take it out and get you copies --

MR. MENSCH: We have copies, your Honor. I am sorry.

THE COURT: Is there any cross-examination of this witness?

MR. KHEEL: No, your Honor.

THE COURT: Thank you very much, you are excused.

(Witness excused.)

THE COURT: Are there any other witnesses?

MR. MENSCH: We may have one more but I would like a few moments to consult with my colleague, if I may.

THE COURT: Go ahead.

MR. SCHAEFFER: The plaintiff rests, your Honor.

MR. KHEEL: Your Honor, before we put any witnesses on, and we do have witnesses here, I would like to make a brief statement and submit to you a brief that we have. We believe that on the evidence submitted so far it's patently clear that injunctive relief is inappropriate.

The evidence so far shows that they are seeking to specifically enforce a personal service contract which the courts rarely, if ever, grant. In the moving papers they submitted to you there is no case cited where a service contract of this sort was enforced.

Further, they have adduced not a shred of evidence to support irreparable injury. Although reference is made in their moving affidavits to a damage of their reputation, not one word was mentioned this morning or this afternoon about damage to their reputation. The only thing that even comes close is this reference to the union contract which was referred to in the moving papers and testified to about today.

THE COURT: Let me ask you this. Are you moving to dismiss?

MR. KHEEL: I move to deny the injunction.

THE COURT: What is the general nature of the proof that you have available? Is it from out of town so that it would be good judicial husbandry to have the proof on the record so I can make a decision here?

MR. KHEEL: I think the evidence you have before you, you can make the decision. I do have out of state witnesses.

THE COURT: On what subject?

MR. KHEEL: Essentially to corroborate what I guess was put forth in the sense that Mr. Tolve indicated there was no meeting of the minds and there were substantially different terms of the contract and that written notices of termination were in fact sent.

THE COURT: I will reserve decision on your motion to deny the preliminary injunction and hear your proof.

MR. KHEEL: I would like to hand up a copy of our brief.

THE COURT: Let me just have a moment to go through this.

MR. KHEEL: We would like to call Mr. James Bickle.

J A M E S B I C K L E, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KHEEL:

Q Are you presently employed by Anheuser-Busch?

A Yes.

Q Can you tell me what your position is?

A My position is manager of merchandising and food operations for Busch Gardens Division.

Q When did you assume that position?

A I assumed official responsibility for the food portion in March of 1974 and had been involved in it prior to that. I assumed my position in St. Louis in November 1971 as director of merchandising.

Q Since approximately when have you been involved in the operations or the affairs of the restaurants at Busch Garden?

A Starting more or less in an unofficial capacity since 1972, early '73.

Q During 1973 to 1974 were you involved in conferences and meetings with representatives of Restaurant Associates?

A I was involved, yes.

Q From time to time were you down in Old Swiss House with the fast food operations to review them and to see how they were going?

A Yes, I was.

Q Those were your responsibilities in fact?

A Those were responsibilities that had been delegated to me at that time, yes.

Q During that period can you tell me if any complaints came to your attention about those operations?

THE COURT: I don't think that need be gone into in connection with the application for a preliminary injunction. I think the burning question in the matter is the contractual relationship if any between the parties, and I would like to have you focus on that for the time being.

Q Mr. Bickle, did you send a letter with an enclosure to Mr. Clements on January 28, 1974 which has been marked Defendant's Exhibit B in evidence?

A Yes, I did.

Q Was that enclosed agreement ever signed?

A To my knowledge it was not.

Q Did you ever orally agree with representatives of the plaintiff that the agreement for the period 1971 to 1973 would be extended?

A No, I did not.

Q Did you send to representatives of the plaintiff on September 18, 1974 a proposed draft agreement?

A Yes, I did.

Q Did they ever sign that agreement?

A Not to my knowledge.

Q After you mailed that proposed agreement did you have conversations with Mr. Clements concerning the subject

matter of same?

A I had conversations regarding whether it was going to be signed and returned, yes.

Q What did he say during those conversations?

A Are you referring --

Q Your draft.

A The February '73?

Q I am referring to your letter and enclosure in September of 1974.

A '74, okay. We had conversations primarily between myself and Verne Clements and, as I recall, on one or two occasions with Ralph Tolve, about when the agreement was going to be returned to us signed.

Q What did he say?

A The gist of the reply was that it was in the works. It was being considered and that something would happen.

Q Did you thereafter receive a letter dated November 7th from Miss Lee Bernstein enclosing a counterproposal?

A Yes, I did.

Q Could you tell me what you did upon receiving that document?

A I took this document to Mr. Carpenter in our legal department and asked him to review the language of the document and indicate to me what, in his opinion, were the

changes, if any, that had been made.

Q Did you thereafter review the document to see what changes had been made?

A Yes, I did.

Q Did you see the changes that had in fact been made?

A Yes, I did.

Q Did you form an opinion as to whether those changes were material or not?

A Yes, I did.

Q Could you tell me what your opinion was?

MR. SCHAEFFER: I would object, your Honor.

THE COURT: Sustained.

Q Mr. Bickle, after Mr. Carpenter reviewed Exhibit 7 in evidence did you have occasion to draft a letter addressed to Mr. Tolve?

A Yes, I did.

Q I show you a copy of a letter dated December 10, 1974 unsigned. Did you in fact draft this letter?

A Yes, I did.

Q Did you send it?

A No, I did not.

MR. KHEEL: Your Honor, we would like to have that marked in evidence.

MR. SCHAEFFER: I am going to object to the

introduction of this letter.

THE COURT: Have you looked at it?

MR. SCHAEFFER: I certainly have, your Honor. The first time we saw it was today because Mr. Bickle never sent it to anyone. To the extent it's a self-serving declaration --

THE COURT: Is it any more self-serving than the ones you put in evidence?

MR. SCHAEFFER: Except copies of those went to the Busch people. This was a document never transmitted outside of the offices of Busch. It's an interoffice memo and I don't see the basis of its admission into evidence.

MR. KHEEL: It serves as a contemporaneous --

THE COURT: If there are those differences he can testify to. The letter itself is excluded.

Q Can you tell me if you recall what differences you observed between Plaintiff's Exhibit 6 and Plaintiff's Exhibit 7 for identification?

A Primarily the differences were in regard to the term of the contract. They requested three years as opposed to our offer of two. The number of maintenance men, two maintenance men rather than three. The provision that they had eliminated our sentence in our proposed contract whereby the intent of the maintenance agreement was that Anheuser-Busch should be responsible for major maintenance and not

minor or routine maintenance.

In addition they had installed a clause giving them right of first refusal to any subsequent agreement that we might want to enter in with anyone in regard to the operation of the fast food at Busch Gardens. And in addition to that they had inserted a portion which stated that we would agree in advance not to construct any new fast food facility in Busch Gardens or alter any facility that would offer any food item that would be in competition in menu or price with food items offered in the Old Swiss House.

There were also some changes in regard to indemnity provisions which were pointed out by the legal department.

Q Were these alterations acceptable to you?

A No, they were not.

Q Did you ever tell plaintiff why these alterations were not acceptable to you?

A No. To my knowledge I did not discuss these specific alterations with the plaintiffs after the time the letter was drafted.

Q And you did not send that letter of December 10; is that correct?

A That is correct.

Q Why not?

MR. SCHAEFFER: Objection.

THE COURT: Sustained.

Q Was there a reason why you did not communicate to plaintiff -- strike that.

Did you ever tell the plaintiff that its proposal of November 7th was unacceptable?

A Well, in May when I made the specification to Mr. Tolve that it was unacceptable I did.

Q Prior to then had you ever told the plaintiff that the contents of its proposal were unacceptable?

A No, I did not because --

MR. SCHAEFFER: Objection. The question has been answered.

THE COURT: That is an answer to the question.

Q Was there a reason why you did not tell the plaintiff that its draft was unacceptable?

MR. SCHAEFFER: Objection.

THE COURT: If it was a counterproposal, it didn't make any difference.

Q Did you ever tell the plaintiff that it was acceptable?

A No, I did not.

Q Calling your attention to the summer of 1974, did you have a meeting with Mr. Tolve, Mr. Clements, representatives of the plaintiffs in Tampa?

A Yes, I did.

Q Who was present at that meeting?

A At that meeting were Mr. Tolve, Mr. Clements, Sid Sherman was in and out of the meeting, myself, Bill Thurman, general manager of the Busch Gardens Division, and Joe Fincher, general manager of Busch Gardens Tampa.

Q Can you tell me what occurred at that meeting as best you can recall?

A We had discussions during the meeting with regard to proposed menu changes for the Old Swiss House. Mr. Tolve had recommendations in that regard. We also, as I recall, discussed the takeover of the fast food operations and the technicalities of following through with that takeover.

We discussed I think briefly some problems that we were having in regard to some payments for maintenance and so on, but toward the end of the meeting we got into a discussion of the renewal of the Old Swiss House agreement and what terms and conditions it would be under.

I mentioned that our losses in the Old Swiss House for 1972 were $182,000, that our losses there in 1973 were in excess of $160,000 -- excuse me. Let me correct that. Our losses in '73 were 182,000 and in '74 we had projected a significant loss, and I stated to Mr. Tolve that in view of the significant losses that we had incurred at the Old

Swiss House, that we felt that we had to have an increase in the rental percentage from 2-1/2 percent to 5 percent of gross sales in the Old Swiss House.

Immediately after my making this request to Mr. Tolve he became very adamant about not increasing the rental percentage, and then I recall very clearly he made the remark that normally I don't like to do business in this manner, but as you may or may not be aware we have extensive restaurant operations throughout New York, New Jersey. He mentioned a number of operations and he said we feature Anheuser-Busch beer products throughout these units. We use -- he mentioned the figure of some 500,000 barrels of Anheuser-Busch products each year, and whether or not we reach an agreement in regard to the Old Swiss House operation will have a direct effect on whether Anheuser-Busch products are to be continued to be featured at our restaurants.

Q Do you construe that to be a threat?

MR. SCHAEFFER: Objection.

THE COURT: Sustained.

Q At the end of the meeting in December of 1974 was it your impression that there had been an agreement reached between Busch and the Old Swiss House or rather Restaurant Associates?

MR. SCHAEFFER: Objection.

THE COURT: Sustained.

Was there an agreement reached? Did the minds meet on an agreement at that time?

THE WITNESS: No, sir.

Q Mr. Bickle, as I understand your testimony at the close of this meeting there was no meeting of the minds; is that correct?

MR. SCHAEFFER: I object, your Honor.

THE COURT: The only thing that ruined your question is what your understanding is. We are not testing that. Was there?

Q Was there a meeting of the minds at the end of this meeting as to a new agreement?

A No.

Q Did there come a time thereafter when there was a meeting of the minds as to the terms of the new agreement between Restaurant Associates and the defendant Busch?

THE COURT: He wants to know did there ever come a time when there was a meeting of the minds on the amended contract or on an amended contract.

THE WITNESS: No, not that I am aware.

Q In November 1974 did Restaurant Associates stop managing the fast food operations at Busch Gardens?

A Yes, they did.

Q Prior to November 4, 1974 had there been an agreement or a meeting of the minds as to a term of an agreement for their operation of those facilities?

A Would you restate the question.

THE COURT: I don't know what you are talking about.

Q Defendant's Exhibit B for identification is a proposed written agreement that you have testified was not signed.

A Right.

Q During early 1974 was there any meeting of the minds as to how long Restaurant Associates would continue to operate the fast food facilities?

A During early 1974 was there any meeting of the minds, yes, there was.

Q What was that?

A They would continue to operate the fast foods service until November 4, 1974.

Q Was there also an agreement in early 1974 that until that date the compensation that Busch would receive from the gross receipts of those fast food operations would be reduced from 40 to 35 percent?

A Yes, there was.

Q In fact did that occur?

A Yes, there did.

MR. KHEEL: I have no further questions of this witness.

THE COURT: Any cross-examination?

MR. SCHAEFFER: I need just a couple of minutes.

THE COURT: Let's go ahead. There shouldn't be these delays in the conduct of the trial. This is not material that is unknown to you or unanticipated. Let's move right ahead.

CROSS-EXAMINATION

BY MR. SCHAEFFER:

Q Mr. Bickle, you testified that on or about September 18, 1974 you sent a draft agreement to Mr. Tolve?

A Yes.

Q And you have also testified that between that date and the date that you got an agreement from Restaurant Associates sent by Miss Bernstein that you spoke on the telephone with Mr. Tolve and with Mr. Clements?

A Yes.

Q Can you tell me how many times you spoke with Mr. Tolve on the phone between the time you sent your draft agreement on September 18, 1974 and the time that you received Miss Bernstein's draft?

A Possibly once or twice to Mr. Tolve.

Q During that period of time?

A Yes, as I recall.

Q Can you tell me as best you can recall the substance of each of those telephone conversations?

A It was to inquire as to when our proposed contract was to be signed and returned.

Q And that was the conversation on each of those occasions?

A Yes.

Q How many times was it, Mr. Bickle, that you spoke with Mr. Clements between the time that you sent out your proposed agreement on September 18, 1974 and the time that you received Miss Bernstein's draft?

A I can't recall exactly, possibly once or twice. I don't remember exactly.

Q Did you speak to Clements more than you spoke with Tolve during that period?

A I had more occasion to have contact with Clements so it would be logical that I did, yes.

Q Do you have a full log with you today or do you maintain a full log indicating telephone calls which you make on a given day?

A No, I do not.

Q Do you have any records of these telephone calls that you say you made to Mr. Tolve and to Mr. Clements?

A No, I do not.

Q In the aggregate the number of telephone calls which you made you would estimate to be approximately four?

A From two to four. I would say possibly total maybe more like two.

Q Prior to receiving Miss Bernstein's draft?

A Yes.

Q I show you Plaintiff's Exhibit 7, a copy of a letter from Miss Bernstein and a draft which she sent. Would it be fair to say you received that on or about November 7, 1974, the date it appears?

A Yes.

Q Mr. Bickle, isn't it a fact that after having sent Plaintiff's Exhibit 6 to Mr. Tolve you left the country for a considerable period of time?

A Yes, I did.

Q For how long a period of time did you leave the country?

A Approximately ten or eleven days.

Q Could it have been longer than that?

A No.

Q I show you Plaintiff's Exhibit 6. Is it correct that in that letter dated September 18, 1974 you state that you will be out of the country until October 14, 1974, a

period of approximately four weeks?

A That is assuming that I left on September 18th. I did not.

Q Is it your testimony you called Mr. Tolve or Mr. Clements prior to the time that you left the country?

A It could be that I may have called perhaps once before I left and I think we had a conversation after I returned.

Q You had been engaged, had you not, to one extent or another, in the negotiation of previous agreement with Restaurant Associates for operation and management at Busch Gardens, had you not.

A I had been involved, yes.

Q And you had been involved in the negotiation or in the drafting, had you not, of Plaintiff's Exhibit 5, an agreement dated December 8, 1972?

MR. KHEEL: Could you show the witness that exhibit, please.

MR. SCHAEFFER: Sure.

A Your question was was I involved in the formation of this agreement?

Q Not in the formation but were you involved in any negotiations, correspondence or communications relative to that document prior to its execution by Restaurant Associates?

A Only very superficially.

Q Can you tell me who the individual or individuals were at Busch who were involved in correspondence or communications relative to that instrument prior to its execution by Restaurant Associates?

A Well, my understanding was that this document was similar in many respects to the document signed back in 1969 at which point negotiations were being conducted I believe between Mr. Bender and Mr. Vasdees and Mr. Tolve.

Q Have you ever undertaken a comparison of the agreement that had been negotiated in 1969 with the agreement you presently have in front of you, Plaintiff's Exhibit 5?

A No, I have not.

Q Mr. Bickle, more particularly, and if I might see the agreement for a moment, I believe his Honor has a copy which you can use if you need it.

THE COURT: What is the date?

MR. SCHAEFFER: December 8, 1972, Plaintiff's Exhibit 5.

Q I refer your attention to page 7, paragraph 4, subparagraph B. Are you familiar as of today, Mr. Bickle, with the terms of that paragraph?

A Yes, I am.

Q When for the first time, Mr. Bickle, did you become

familiar with the provisions of that subparagraph?

A I can't say for certain when I first became aware of that provision.

Q On August 1st, 1974, Mr. Bickle, were you familiar with the terms of that subparagraph?

A I was aware that it existed, yes.

Q Had you read the paragraph prior to that date?

A Yes, I read the contract prior to that date, yes.

Q And you had read that provision in the contract?

A Right.

Q Mr. Bickle, did you ever write a letter to Restaurant Associates, to Mr. Tolve at Restaurant Associates, 1540 Broadway, certified or registered mail, indicating that Busch was terminating -- that the agreement shall terminate at the end of a particular period of time?

THE COURT: You are excluding Exhibit A, I take it. You are referring to the period 1974?

MR. SCHAEFFER: I am including Exhibit A.

A The answer to the question is no, I did not under those conditions.

Q You did not send such a letter; is that correct?

A Not to Mr. Tolve registered mail, et cetera.

Q That is what the agreement provides, does it not?

A As I read it, yes.

THE COURT: Does the agreement provide that this witness shall send it?

MR. SCHAEFFER: It doesn't provide this witness shall send it, but it provides it be sent to a particular individual to a particular address.

THE COURT: But the question as phrased states that this witness will send it. You are limiting yourself unnecessarily and that is what I am calling your attention to.

Q Mr. Bickle, you are familiar with the terms of Plaintiff's Exhibit 5?

A In general, yes.

Q And you have a copy of it in front of you?

A Yes.

Q Does that agreement provide that it should be automatically renewed for additional terms of one year including the automatic renewal provision unless notice is given in a certain way by either of the parties?

A I believe the clause states this agreement sahll be automatically renewed for additional term of one year.

Q You are reading from paragraph 4-B?

A Yes.

Q And so --

A Terms not being plural.

Q You will concede, however, that that automatic

renewal provision also provides that in the event of an automatic renewal the automatic renewal provision remains in the contract?

A I would assume that is what it means, yes.

Q I now direct your attention to paragraph 14, on page 12 of that agreement, and that paragraph provides that any notices to be served pursuant to the agreement shall be sent to the offices of Restaurant Associates at New York, New York to the attention of Mr. Ralph Tolve; is that correct?

A That is correct.

Q Mr. Bickle, did you ever send a notice of termination pursuant to paragraphs 4-B and 14 of this agreement to Mr. Tolve?

MR. KHEEL: That question has been asked and answered and I object to it.

THE COURT: It has been asked and it has been answered. You may answer it again, if you wish.

A You are referring to --

MR. SCHAEFFER: This is cross-examination --

THE COURT: I didn't ask for any comment. I don't want you to comment.

(Question read.)

THE WITNESS: Can I have a clarification, your Honor? He is talking about the notice that I sent in 1974,

August of '74?

THE COURT: That is not the question he asked you.

(Question read.)

THE COURT: He is asking you for what you may or may not have done, you personally.

THE WITNESS: I sent a notice. Whether it was technically pursuant to paragraph 4-B, I can't answer but I did send a notice.

Q What date was that?

A The notice you referred to in 1974, I believe we can pinpoint the date. It was early August.

Q I show you Plaintiff's Exhibit 9, a letter dated August 1st, 1974. Is that the document you are referring to?

A Yes.

Q Was that document sent to Mr. Ralph Tolve?

A No, it was not.

Q Was it sent to the offices of Restaurant Associates at 1540 Broadway, New York, New York?

A No.

Q Does that notice use the word terminate?

A No.

Q Isn't it a fact that that notice merely states that we are giving written notice of proposed changes in the upcoming operating contract with Restaurant Associates

Industries, Inc.?

A That is what it so states.

Q Mr. Bickle, other than this letter dated August 1st, 1974 did you cause any writings to be sent to Restaurant Associates pursuant to paragraphs 4-B and 14 of the agreement?

A Did I cause any or did I do any?

Q Did you cause any to be sent.

A That is a difficult question for me to answer. There was one sent. Whether I caused it --

Q I will break that into two questions.

Other than the letter of August 1st, 1974 did you yourself send any other notices pursuant to section 4-B and 14 of the 1972 agreement, you yourself?

MR. KHEEL: I don't believe he testified that the letter was sent pursuant to paragraph 14.

THE COURT: If that is an objection, put it in the proper form.

MR. KHEEL: I object to the question on the grounds of improper form.

THE COURT: Overruled.

A Whether or not the notice was pursuant to 4-B, I couldn't answer. I did send a notice.

Q What date was that?

A I don't recall the date.

Q Other than the August 1st --

A The August 1st since you have shown me, yes.

Q But there was another one, you say?

A As I recall there was.

Q Do you have a copy of it with you today?

A No, I don't.

Q Mr. Bickle, are you aware of notices sent or of a notice or notices sent by any other employee of Busch other than yourself to Restaurant Associates pursuant to paragraphs 4-B and 14 of the 1972 agreement?

A Yes, I am.

Q Can you state the date or dates of each of those notices?

A There was a notice sent by a Mr. Long. I can't state the date specifically. I believe it was September of '73.

Q Were there any others?

A Not that I am aware of.

Q I show you Defendant's Exhibit A and ask you if that is the notice that you are referring to.

A Yes.

Q Are there any other notices which were sent pursuant to paragraphs 4-B and 14 of the 1972 agreement, to your knowledge?

A Written notices, not to my knowledge. There was, however, reference I think to these.

Q To the notices which you have just referred to?

A Yes. Reference in the draft amendment sent February of '73.

Q Can you state where the references were? I didn't hear the end of your sentence.

A As I recall we submitted an amendment to extend the contract expiring December 1973 to November 4, 1974. The notice given by Mr. Long was referred to in that amendment.

Q I show you Defendant's Exhibit B together with the enclosure which is denominated amendment to agreement. Is that what you are referring to?

A Yes.

Q Mr. Bickle, can you tell me who prepared the document attached to your letter entitled amendment to agreement?

A Our legal department.

Q And they didn't have discussions with the legal department of Restaurant Associates before they prepared this document, did they?

A Discussions between our legal department and Restaurant Associates?

Q Relative to this document, amendment to agreement.

A I have no way of knowing what discussions, if any,

took place between our legal department and Restaurant Associates.

Q But you do know that this document was prepared by your legal department?

A Yes, that document was prepared by our legal department.

Q Did you ever receive a signed copy of this document back?

A No, I did not.

Q You had a meeting with Mr. Tolve and others in July 1974; is that correct?

A That is correct.

Q Mr. Tolve told you he wasn't going to buy your beer any more?

A Not in those words. Not those exact words.

Q What did he say?

A As I recall the conversation, as I stated previously, we mentioned that our losses, operating losses in the Old Swiss House, were running between 150 and $20,000 a year and they were unacceptable to us. That we felt it was necessary for us to have an agreement with Associates to raise their rental percentage from 2-1/2 percent to five percent.

Q The agreement which you sent out on September 18, 1974 provided for a rent of how much?

A 2-1/2 percent.

Q Not five percent?

A That is correct.

Q Was it agreed on the meeting you had with Mr. Tolve that the rent would be 2-1/2 percent?

A You mean was it specifically agreed that it would be 2-1/2 percent?

Q Was it agreed it would be 2-1/2 percent?

A No, not at that July meeting. It was not agreed that it would be 2-1/2 percent.

Q Did you meet with Mr. Tolve after that July meeting?

A Before I sent the contract?

Q Yes.

A No, I did not meet with him personally after that that I am aware of.

Q When was the agreement reached, Mr. Bickle, that the percentage rent would be 2-1/2 percent?

A That agreement was reached back in 1969. 2-1/2 percent had been the percent of rental for the Old Swiss House from '69 on.

Q Mr. Bickle, you testified that you had a meeting with Mr. Tolve and Mr. Sherman and Mr. Thurman and Mr. Clements in July 1974.

A And Mr. Fincher, general manager of Busch Gardens

Tampa.

Q He was present?

A Yes.

Q And that you had a meeting in July 1974 with those men?

A Yes.

Q And that you told Mr. Tolve that an increase of rent, Busch was asking for an increase of percentage rent for the Old Swiss House; is that correct?

A Correct.

Q And you told them Busch wanted five percent?

A That is correct.

Q And he then said in essence that he wouldn't buy your beer any more?

A I stated to my knowledge what he said previously. That was the intent of his statement to myself at that time.

Q Did you then say to him --

A If an agreement were not reached on terms acceptable to him.

Q Did you tell that to Mr. Long?

A Well, my immediate superior is Mr. Thurman, the general manager of Busch Gardens Division, and he was present at this meeting.

Q Did you communicate what Mr. Tolve told you about

buying your beer to Mr. Long?

A Both Mr. Thurman and subsequently myself communicated that to Mr. Long.

Q When you left the meeting on July 30, 1974 or during July of 1974 did you tell Mr. Tolve that you would agree to the 2-1/2 percent rent, the continuation of that percentage rent?

A We did not tell Mr. Tolve specifically that we would agree to the 2-1/2 percent rent.

Q When did you tell Mr. Tolve that?

A Obviously when I sent him the new proposed contract.

Q And not before that?

A No.

Q So that between the time of that July meeting and September 18, 1974 you are saying you did not inform Mr. Tolve that you were willing to continue the 2-1/2 percent rent?

A Not specifically. I had not the authority to make any final agreements with Mr. Tolve. I am not a corporate officer. I can't commit the corporation in contractual matters of this nature.

Q You were at the meeting?

A I was at the meeting as a representative and negotiator.

Q And Mr. Thurman was at the meeting?

A Yes.

Q You testified that Busch had experienced a loss of $182,000 in 1973; is that correct?

A That is correct.

Q Was that a cash loss?

A I don't understand your question.

Q Was that, to a certain extent, attributable to depreciation of property that existed on the premises of the Old Swiss House?

A Certainly depreciation was a part of their loss, yes.

Q Do you know how much a part?

A The major part as I recall has been maintenance.

Q It was maintenance?

A Yes.

Q Do you recall what the breakdown of the numbers is?

A For that particular year I do not. I do recall that our projected loss for this year at the Old Swiss House, budgeted loss was $174,000. I may stand corrected on this. Approximately 116,000 which was maintenance related.

Q And the rest?

A Depreciation, taxes, insurance.

Q Mr. Bickle, there came a point in time, did there

not; when you read Plaintiff's Exhibit 7?

A Yes.

Q And you compared Plaintiff's Exhibit 7 with Plaintiff's Exhibit 6 which was the draft that you had sent to Mr. Tolve?

A Our legal department compared it, yes.

Q Did they prepare a memorandum for you outlining the differences between the two agreements?

A They hand marked a copy showing the differences as they saw them.

Q I think you testified that the draft submitted by Restaurant Associates was unacceptable to you?

A Yes.

Q Can you tell me the date upon which you reached that determination?

A I reached it basically as soon as I received the spell-out of the changes from the legal department and, of course, it was not my decision to say yes, we will sign this or no, we won't. I forwarded my impression of these changes to Mr. Long.

Q On what date?

A I don't recall the specific date.

Q You say that you forwarded a particular document to Mr. Long.

A I didn't say I forwarded a document. I said I communicated the changes to Mr. Long.

Q Can you approximate what date it was that you determined that the contract was unacceptable? That is the Restaurant Associates draft.

A I don't know exactly what date I received this copy but I would assume it was within a week or ten days of the time I received it. It had to have time to go to legal.

Q Would it be fair to say by the end of November 1974 you had made a determination that the proposal made by Restaurant Associates on November 7, 1974 was unacceptable to you?

A That would be fair, yes.

Q Between the time that you made that determination at the end of November of 1974 and May 27, 1975 did you communicate with Mr. Tolve and inform him that the agreement sent by Miss Bernstein was unacceptable?

A As I stated, I didn't have the authority to state or incur obligations on Anheuser-Busch's behalf as to whether that document was acceptable to the corporation. Personally I did not feel that it was.

Q Mr. Bickle, I asked you a simple question. Did you from the time you received Plaintiff's Exhibit 7 until May 27, 1975, between those two dates, inform Mr. Tolve that this

contract, this agreement, was unacceptable to Busch?

A To Anheuser-Busch?

Q Yes.

A No, I did not.

Q I would ask you the same question as it would relate to Mr. Clements.

A The same is true. No, I did not.

Q Either orally or in writing?

A That is correct.

Q With respect to Sidney Sherman between November 7, 1974 and May 1st, 1975, did you communicate with Mr. Sherman and inform Mr. Sherman that the agreement proposed by Restaurant Associates was unacceptable?

A No, I did not.

Q To your knowledge, did any other officer, employee or director of Anheuser-Busch notify any one of those three gentlemen of the fact that the November 7, 1974 draft was unacceptable to Busch?

A I did not notify any Restaurant Associates representative.

Q My question was do you have knowledge. Are you aware of whether any employee, officer or director of Anheuser-Busch notified any of those three individuals who I just named within Restaurant Associates, to wit, Mr. Tolve,

Mr. Sherman or Mr. Clements, that the November 7th proposed agreement by Restaurant Associates was unacceptable to Anheuser-Busch?

A I am not aware of any such notification.

Q And to your knowledge was the first such official notification to Restaurant Associates the delivery of your letter or of the letter signed by Mr. Long to Mr. Tolve by you on May 27, 1975?

A That is correct.

Q And during this entire period of time was Restaurant Associates operating and managing the Old Swiss House on behalf of Anheuser-Busch?

A They were.

Q There came a time, did there not, that you made a telephone call to Mr. Sherman in May of 1975?

A Yes.

Q And you were present during Mr. Sherman's testimony, were you not?

A Yes, I was.

Q You recall questions which I asked Mr. Sherman relating to that telephone call?

A Yes.

Q Mr. Bickle, who within Anheuser-Busch requested that you call Mr. Sherman?

A Requested that I call Mr. Sherman?

Q That is the question.

A I don't recall that anyone specifically told me to dial Mr. Sherman on the telephone.

Q In the beginning of May 1975 you on behalf of Busch made an offer to Mr. Sherman; is that correct?

A That is correct.

Q To enter into a management agreement?

A That is correct.

Q You have testified at least in three or four responses to my questions that you are not authorized to bind the corporation, that you merely negotiate for the corporation, referring to Anheuser-Busch; is that correct?

A That is correct. I am not a corporate officer.

Q Can you tell me which corporate officer instructed you to call Sidney Sherman and to make him an offer to enter into an agreement with the corporation?

A Mr. Long.

Q Did he request that you call Mr. Sherman?

A At the end of May?

Q My questions relate to the beginning of May 1975. You have testified that you were present when Mr. Sherman testified. It relates to the very first telephone conversation that Mr. Sherman said he had when he was in Tampa,

Florida and you called him on the telephone.

A I did call him on the telephone, yes.

Q Had Mr. Long requested that you call Mr. Sherman?

A I don't recall that Mr. Long requested that I call Mr. Sherman on the telephone.

Q Let's start again.

Mr. Bickle, when you called Mr. Sherman on the telephone in the beginning of May 1975 you made him an offer on behalf of Anheuser-Busch, did you not?

A Yes.

Q Is it not your previous testimony that you are neither empowered nor authorized to bind the corporation to contractual arrangements because you are not an officer of the corporation?

A That is true. I cannot sign contracts.

Q And yet in speaking with Mr. Sherman in the beginning of May 1975 you asked him if he wished to enter into a contract with Anheuser-Busch to manage the Old Swiss House; is that correct?

A You are saying in May of '75 I asked him that?

Q Yes.

A I asked him that. I had asked him that. I can't guarantee that it was in May that I asked him that specific question, but I did ask him that, yes.

Q Do you remember having a conversation with Mr. Sherman during the course of which you offered him a job to manage the Old Swiss House at Busch Gardens for Anheuser-Busch?

A That is correct.

Q And the first time you made an offer of that nature, was it made over the telephone or was it made in person?

A The first time I made an offer -- it was in person.

Q Can you tell me when that was?

A That was in February of '75.

Q February '75.

Can you tell me where you were when you made that offer to Mr. Sherman?

A I was in Tampa.

Q Can you tell me who else was present at that meeting?

A Mr. Collins.

Q Who is Mr. Collins?

A Mr. Collins is our financial analyst.

Q Can you tell me what it was that you said to Mr. Sherman during that meeting in February 1975 and what it was that he said to you?

A We said to Mr. Sherman there is a possibility that the contract will not be signed and agreement will not be

reached. We have to make preliminary arrangement for a successor.

Mr. Sherman reiterated that he would very much prefer that the Old Swiss House be retained under RA management and that he continue to work for RA, but in the event it were not possible for us to reach an agreement he would be interested in operating the Swiss House as an independent agent.

Q By the way, was anything else said at that particular meeting that you can recall?

A We briefly at that meeting discussed preliminary terms under what Mr. Sherman might be willing to enter into a contract.

Q Did you thereafter prepare a memorandum of that meeting with Mr. Sherman and with Mr. Collins?

A Prepare a memorandum? I think I made reference to that meeting in a memorandum.

Q Do you have that memorandum present with you today?

A I don't know for sure. I would have to check.

MR. SCHAEFER: With the Court's indulgence I would ask that Mr. Bickle check to see if he has that memorandum with him.

THE WITNESS: I am sure in some memorandum I would have referred to the fact that I had a meeting in Tampa with

Mr. Sherman and Mr. Collins. I normally relayed my activities to my superiors. For instance, when I take a business trip I tell the purpose and nature of the trip and so on.

THE COURT: Next question.

MR. SCHAEFFER: Your Honor, the witness indicated that he might have that memorandum present with him today.

THE COURT: Did he indicate he has it present today?

MR. SCHAEFFER: He said he might have it in the courtroom.

THE COURT: Did he say in the courtroom?

MR. SCHAEFFER: I don't know if he used the word courtroom.

THE COURT: I just want to know whether you are overstating his position. Do you know whether you have such a memorandum in the courtroom or in the office in St. Louis? Where is it?

THE WITNESS: If he is referring to a specific memorandum outlining in detail what happened at the meeting, I can't say for sure that it exists. I don't know. I don't know if I prepared a specific detailed memorandum of the meeting. I am sure I made reference to it.

THE COURT: The only question we are interested in is if you have anything in the courtroom that you know of that makes reference to that early meeting. At this time do

you know of anything in the courtroom?

THE WITNESS: I would say it's possible, your Honor. I can't recall exactly if there is something in my files that refers to that meeting. I will be glad to look through my files.

THE COURT: Please ask your next question.

BY MR. SCHAEFFER:

Q Mr. Bickle, prior to speaking with Mr. Sherman in February -- do you know the date, by the way, it was that you spoke -- do you know what day it was in February 1975 that you spoke with Mr. Sherman?

A Not specifically. I believe it was on or about February 9th.

Q Prior to February of 1975 had you spoken with Mr. Sherman about the possibility of Mr. Sherman coming to work for Anheuser-Busch?

A Prior to February '75 I don't recall that specifically I asked Mr. Sherman to come to work for Anheuser-Busch.

Q When you spoke with Mr. Sherman in February 1975, Mr. Bickle, had you already informed Restaurant Associates or did you inform Restaurant Associates that you were making an offer to Mr. Sherman for employment at Busch Gardens?

A No, I did not.

Q After you made that offer of employment to

Mr. Sherman and you had further discussions with Mr. Sherman on that date in February of 1975, did you inform any employee, director or officer of Restaurant Associates that you had made such an offer to Mr. Sherman?

A I did not.

Q After that February 1975 offer can you tell me when the next time it was that you spoke to Mr. Sherman relative to his employment by Anheuser-Busch?

A The next time -- we had subsequent telephone conversations but I don't recall the dates.

Q Do you know if you spoke with him during the month of March 1975?

A I would assume I spoke to him. I had occasion to speak to him very often.

Q Do you know if you spoke to him relative to his employment of Anheuser-Busch as manager of the Old Swiss House during March of 1975?

A I don't recall that I did or did not in the month of March.

Q Prior to speaking with Mr. Sherman in February of 1975 relative to his employment as manager of the Old Swiss House did you have a conversation with Mr. Long relative to your meeting with Mr. Sherman?

A Yes, I made Mr. Long aware that I was going to meet

with Mr. Sherman.

Q Did Mr. Long suggest that you meet with Mr. Sherman and make an offer of employment to him?

A If I were in agreement, yes.

Q Was it Mr. Long's suggestion that you do that if you were in agreement?

A Yes.

Q Do you know if Mr. Long prior to your meeting with Mr. Sherman in February 1975 communicated with any officer, employee or director of Restaurant Associates and informed such person or persons that an offer was going to be made to Sidney Sherman?

A I am not aware of any such notification.

Q Mr. Bickle, you came to New York on May 27, 1975; is that correct?

A Right.

Q And you saw Mr. Tolve?

A Right.

Q Prior to May 27, 1975 had you told Mr. Tolve that Busch was terminating the agreement for the Old Swiss House providing for management of the Old Swiss House by Restaurant Associates?

A No, I had not.

Q Prior to May 27, 1975 had you informed Mr. Tolve or

any other employee, director or officer of Restaurant Associates that Anheuser-Busch had made an offer to Sidney Sherman?

A No, I did not.

Q On May 27, 1975 did you tell Mr. Tolve that Busch had made an offer to Sidney Sherman to manage the Old Swiss House?

A During that meeting Mr. Tolve stated I understand you have been talking to Sid, is that correct? And I replied, yes, it is.

Q Did you tell him that you had reached agreement pursuant to which Sidney Sherman was going to operate the Old Swiss House instead of Restaurant Associates?

A That point didn't go beyond that very brief discussion. Mr. Tolve did not follow up on the point.

Q So he did not ask the question and you did not volunteer the information?

A No, with his statement that I understand you have been talking to Sid, I assumed that he was aware of the situation.

Q But you did not in any event tell him that day that Sherman had agreed with Anheuser-Busch to an agreement pursuant to which Sherman would manage the Old Swiss House instead of Restaurant Associates?

A No, I did not elaborate.

MR. SCHAEFFER: If I might have a moment, I think I am virtually completed. I would like to review a few documents to see if I have any questions.

I have no further questions.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. KHEEL:

Q Did you receive a carbon copy of a letter dated March 18, 1974 from Mr. Clements to Mr. Bates?

A Yes, I have seen this.

MR. KHEEL: I offer it in evidence.

MR. SCHAEFFER: I object. I don't see the relevance of the document.

THE COURT: I will receive it and decide the relevancy of it at the appropriate time.

xxx (Defendant's Exhibit C received in evidence.)

Q Mr. Bickle, in most of your communications with representatives of the plaintiffs would be with Mr. Clements?

A Yes.

Q Was there an occasion when Mr. Tolve directed that you have communication with Mr. Clements?

A Yes, there was.

Q About when was that?

A As I recall this was at the meeting in 1973 which Mr. Long also attended. At that meeting it was agreed that communications would be between myself on behalf of Anheuser-Busch and Verne Clements on behalf of Restaurant Associates.

MR. KHEEL: I have no further questions of this witness.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Any other witnesses?

MR. KHEEL: I have another witness from St. Louis. I have a few questions I want to ask. I can't indicate how long the cross will be.

THE COURT: Let's get started.

MR. KHEEL: Mr. Long.

D E N N I S L O N G, called as a witness by the defendant, being first duly sworn, testified as follows:

THE COURT: There is no need to reprove documents in evidence. I read them all and I know who wrote them and I know what they say.

DIRECT EXAMINATION

BY MR. KHEEL:

Q Mr. Long, after you wrote the letter of September 24, 1973 which is Defendant's Exhibit A for identification, and I show you a copy of it, did you on any occasion sign any agreements between Restaurant Associates and Anheuser-Busch?

A I did not.

Q Did you enter into any oral agreements with any representatives of the plaintiff?

A I did not.

Q During 1973 did you have discussions with the plaintiff or representatives of the plaintiff concerning the subject of Busch's desire to take over the fast food operations?

A I did.

Q Would you tell me as best you can when those conversations occurred?

A May of 1973.

Q Was there a meeting on that date?

A There was.

Q What occurred at that meeting?

A We talked about several items. We talked about the takeover of the fast food operation. We talked about the fact we were unhappy with several operational items at the Old Swiss House. We talked about the inadequacy of the manager at that time, and I specifically requested and

received from Mr. Tolve a copy of the signed contract that had previously been opened for about a year.

Q At this meeting did Mr. Tolve tell you anything Restaurant Associates' satisfaction with the fast foods operation?

A He said he was dissatisfied with it.

Q What else did he say?

A Profit level was not high enough, inflation had set in and they needed more money from the fast food operations. I advised him we would like to take over the fast food operations. Frankly I don't recall his comment, but he did specifically say he was unhappy with the fast food operation.

Q Did you make a memorandum of that meeting at or about the time of the meeting?

A I did.

Q Mr. Long, is this a copy of the memorandum of the file you made at or about the time of the meeting?

A This is.

MR. KHEEL: I would like to offer it in evidence.

MR. SCHAEFFER: The memorandum doesn't indicate and the case is that Restaurant Associates didn't receive a copy of it. To the extent it contains self-serving declarations I object.

THE COURT: Is this an internal memorandum?

MR. KHEEL: Yes, it is, your Honor.

THE COURT: Internal memorandum?

MR. KHEEL: Yes.

THE COURT: Sustained.

Q Is the memorandum that you set forth essentially set forth what you just testified to?

MR. SCHAEFFER: Objection.

THE COURT: That is bootstrapping irrelevant evidence.

Q During the latter part of 1973 did the plaintiff request that the percentage that Busch received on the fast food operations be reduced from 40 to 35 percent?

A Actually they requested it at the meeting in May.

Q Did you ultimately agree to that?

A We did.

Q Did you agree to that in part upon the understanding that they would be getting out November 1974?

A November 4, 1974.

Q Plaintiff's Exhibit 6 and Plaintiff's Exhibit 7 in evidence are the draft that Mr. Bickle sent to Restaurant Associates and the counterproposals sent back.

Do you recall the testimony earlier today about those documents?

A I think so.

Q Did you receive a copy of the agreements at or about the time in question?

A The agreement that Bickle sent to our aid, did I receive that, yes.

Q Did you receive the counterproposal that came back?

A Yes.

Q Did you determine that the counterproposal was unsatisfactory?

A I did.

Q Did you decide at some point in December or January, December 1974 or January '75, after receiving the counter-proposal that you wished to terminate Restaurant Associates as operator?

A I did.

Q Thereafter in fact they were terminated?

A They were.

MR. KHEEL: I have no further questions of this witness.

CROSS-EXAMINATION

BY MR. SCHAEFFER:

Q What is your position with the defendant?

A Group vice president over three divisions.

Q For how many years have you been employed by the defendant?

A Twenty-two years.

Q Was it your testimony, Mr. Long, on direct examination that you never entered into any oral agreements with Restaurant Associates Industries, Inc.?

A Say that again, please.

Q Was it your testimony, Mr. Long, that you yourself never entered into --

THE COURT: The testimony was that after the letter of September 24, 1973 there were no agreements written or oral with Restaurant Associates. Let's go ahead.

Q Mr. Long, did you ever enter into any oral agreements with Restaurant Associates providing for the management or operation of Busch Gardens?

A I did not.

Q I show you your letter of March 13, 1973 previously marked as an exhibit, and I refer your attention to the first sentence of that letter.

A Yes.

Q As of the date of that letter, March 13, 1973, had a contract -- had the December 8, 1972 contract been executed by both parties?

A It had not.

Q Had it been agreed to by both parties?

A It had not.

Q It had not been agreed to by both parties?

A It had not been executed by both parties so in writing it had not been agreed to.

Q The contract for the period December 26, 1971 through December 25, 1973 between Anheuser-Busch and Restaurant Associates although never signed has been agreed to by both parties. Those are the words.

In fact, Mr. Long, wasn't Restaurant -- weren't both Restaurant Associates and Anheuser-Busch acting under the terms of that agreement which had not as yet been signed?

A Can I comment or must I answer yes or no?

Q I would ask for yes or no.

A Yes. I would like to comment. May I?

THE COURT: Wait until your own lawyer asks you.

Q You say there was a meeting in May 1973 and that during the course of that meeting the fast food operations at Busch Gardens were discussed?

A Yes.

Q And that you or another representative of Busch was present at that meeting and indicated that Busch would like to take over the fast food operations at Busch Gardens?

A Yes.

Q Is that an accurate statement?

A That is.

Q What was the date upon which Anheuser-Busch took over the fast food operations?

A November 4, 1974.

Q Approximately one and a half years later?

A Yes.

Q Were you familiar, sir, in May 1973 with the provisions of Plaintiff's Exhibit 5, an agreement dated December 8, 1972 between Anheuser-Busch and Restaurant Associates Industries, Inc. signed by you?

A Yes, this is the contract given by me in May of 1973.

Q Did you, Mr. Long, ever serve notice of termination of that agreement upon Restaurant Associates Industries, Inc.?

A I don't really recall if it was this agreement. But I did serve notice of termination in September of 1973.

Q Are you referring, Mr. Long, to Defendant's Exhibit A, a letter dated September 24, 1973?

A Yes.

Q Was that letter sent certified or registered mail?

A No, it was not.

THE COURT: Is there any objection to its receipt?

MR. SCHAEFER: It's already in.

THE COURT: Was there any objection to the fact as to how the mail was sent?

THE WITNESS: Certainly not to me, sir.

Q Mr. Long, does that letter of September 24, 1973 state that Anheuser-Busch is terminating the agreement between the parties dated December 8, 1972?

MR. KHEEL: The letter speaks for itself.

THE COURT: Sustained.

Q In fact, Mr. Long, after September 24, 1973 Restaurant Associates continued to manage the fast food facilities until November 4, 1974?

A Exactly.

Q And has continued to manage the Old Swiss House through today?

A Yes.

MR. SCHAEFFER: No further questions.

THE COURT: Thank you, you may step down.

(Witness excused.)

THE COURT: Any other witnesses?

MR. KHEEL: No, your Honor.

THE COURT: Defendant rests?

MR. KHEEL: Yes, your Honor.

THE COURT: Any rebuttal?

MR. MENSCH: No, your Honor.

THE COURT: Plaintiff rests?

MR. MENSCH: Plaintiff rests.

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May I hand to your Honor our memorandum of law?

THE COURT: Yes. I will read it overnight and we will reconvene tomorrow morning at ten o'clock at which time I will announce my decision.

(Adjourned to July 9, 1975, at 10 a.m.)

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DECISION OF THE COURT

THE COURT: The plaintiff sues to enjoin the attempted termination as of June 30, 1975 by defendant of an alleged subsisting contract to operate and manage the food and beverage facilities of the Old Swiss House located in Busch Gardens, Tampa, Florida owned by the defendant and claimed to be a unique tourist attraction. The restraint sought is for the duration of such agreement and from carrying out an agreement which defendant entered into with plaintiff's general manager for replacing plaintiff in the operation and management of the restaurant. Substantial damages as well as declaratory relief are claimed.

Jurisdiction herein rests on diversity and requisite amount in controversy.

This suit was commenced on June 20,1975 and on application for a preliminary injunction a temporary restraining order was granted and a hearing was set by consent for July 8, 1975. The parties have presented their proofs at the evidentiary hearing held.

Plaintiff Restaurant Associates Industries, Inc.,(Associates hereafter),is and was at all relevant times a corporation organized and existing under the laws

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of the State of Delaware, having its principal place of business in the City, County and State of New York.

Defendant Anheuser-Busch, Inc., (Busch hereafter), is and was at all relevant times a corporation organized and existing under the laws of the State of Missouri, having its principal place of business in St. Louis, Missouri and is licensed to do business in the State of New York.

Busch is and was at all relevant times the owner of certain premises known as Busch Gardens located in Tampa, Florida. Busch Gardens is a unique tourist facility on more than 250 acres of landscaped grounds containing gardens, lagoons and arbors. Busch Gardens contains and includes numerous tourist exhibits such as Wild Animal Kingdom, an aviary, family oriented amusement and entertainment facilities, boutiques and gift shops and related facilities.

Included among the facilities at Busch Gardens are food and beverage service areas consisting of a first-class restaurant known as The Old Swiss House, hereinafter referred to as Swiss House, and a number of snack bars, juice bars, fruit stands and food carts. Swiss House is an enlarged replica of a restaurant of the same name in Lucerne, Switzerland built in the early 18th century and

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owned by relatives of the wife of August Busch, Jr., a past president of Busch.

In order to view the issues on this application in proper focus it is necessary to understand the background of events from which this controversy arises. There are the following:

Busch was dissatisfied with the operation by an independent food service company of the food and beverage facilities located in Busch Gardens. In 1969 Busch requested Associates, a public company whose principal business is managing restaurant and beverage service areas and offering consultation services with respect thereto, to assume, under the direction and control of Busch, responsibility for the operation of both Swiss House and the so-called fast food facilities consisting of snack bars, food stands and food carts, all located in Busch Gardens.

On or about October 22, 1969 Associates and Busch entered into an agreement providing for the management by Associates on behalf of Busch of all of the restaurant, snack bar, food and beverage facilities, including Swiss House at Busch Gardens. The term of that agreement was two years commencing as of December 4, 1969, which term was extended by agreement of the parties until December 25,

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1971.

Prior to the expiration of the October 22, 1969 agreement the parties apparently agreed to the extension referred to and to structure a new agreement to take effect on December 26, 1971, which they did. The new agreement made was for a term of two years commencing as of December 26, 1971 and contained an automatic renewal clause for one year periods beginning with the end of the first two-year period. The renewals were to be on the same terms and conditions and to take effect annually unless, as stated in paragraph 4(b) thereof, either party gives written notice to the other not less than 90 days prior to the expiration of the initial term or additional term that the agreement shall terminate at the end of the term. This agreement was dated December 8, 1972 but actually was not signed until many months thereafter and made effective as stated, as of a year prior to its date, that is, as of December 26, 1971 and for two years thereafter. This was the last written agreement made by the parties, although, as we shall see, negotiations to reach a revised agreement were undertaken spasmodically without resulting in a meeting of the minds.

During the early part of 1973 attempts to agree on the desired revisions were made. Finally on

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September 24, 1973, 91 days before the expiration of the December 26, 1972 contract, the defendant notified the plaintiff that it was giving notice "in compliance with the requirements of Paragraph 4(b) of the management agreement," (the cancellation clause) that the defendant decided to renegotiate terms of the management arrangement "which is scheduled to terminate December 25, 1973."

This notice was sent within the time limit required therefor and was duly received without objection by the plaintiff as to the timeliness or force of the notice given.

It took until January 28, 1974 the following year for the formulation and submission by defendant to plaintiff of a rough draft of the new terms proposed for a management agreement. This draft was submitted by the defendant. Meanwhile the parties were operating without any agreement binding them and obviously, therefore, were on an at will basis.

"The defendant's January 28, 1974 draft of agreement in its Preamble, stated inter alia:

Busch gave Associates timely notice of its intent to terminate the agreement on December 25, 1973 if it could not renegotiate certain terms of the agreement. To this end Busch and Associates have renegotiated certain

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terms as requested by Busch, as well as certain terms as requested by Associates."

Thereafter, representatives of the parties met in Florida and, in particular, at a meeting toward the end of July 1974 they discussed the relationships of the parties. An understanding was reached then, or perhaps at an earlier time, that the fast food management would be turned over on November 4, 1974 to the defendant and meanwhile the plaintiff would pay a reduced rent from December 26,1973 until November 4, 1974, the rate being reduced from 40 per cent to 35 per cent. No change was to be made in the Swiss House rental. It would remain as it was. The terms for an extension agreement with Swiss House were discussed and many points considered. It was understood that these would be taken up by defendant's representatives with superiors in St. Louis and an effort to accommodate the desires expressed at the meeting would be made.

On August 1, 1974 defendant's manager wrote a letter to plaintiff stating that "As provided in our Agreement [the reference is obscure] we are hereby giving written notice of proposed changes in the upcoming contract with Restaurant Associates Industries, Inc."

On September 18, 1974 the defendant sent to plaintiff a draft copy of the proposed new operating contract

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for Swiss House and asked for legal study and comments and its return for finalization.

On November 7, 1974 the plaintiffs sent to defendant a revised draft of the proposed agreement covering Swiss House. The counter proposals contained therein were substantial and material. More importantly, the alterations were unacceptable to defendant.

It is true that Associates expected to obtain a new management contract and acted that way, but the fact is that it did not obtain one. Indeed, it made arrangements with a labor union in December 1974 operative into 1976. These arrangements were made known to defendant and certainly reflected an expectancy of the parties that they would reach a meeting of the minds and sign a new contract. However, plaintiff's expectancy cannot be equated with a contract. It should have realized that it had not signed with the defendant when it signed with the union.

Matters stood in this posture - at an impasse - until May 21, 1975 when defendant, referring to the agreement dated December 8, 1972, in a reference which is difficult to understand in the light of background, wrote to plaintiff that the letter of August 1, 1974 had notified plaintiff of defendant's intent to terminate "the subject agreement as

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to the terms and conditions then in effect."

Further, that "As we have since been unable to reach agreement as to mutually acceptable terms upon which to continue our relationship, this letter is to notify you of the termination of your agency effective effect midnight, June 30, 1975."

In preparation for this act, the defendant had meanwhile been conducting talks secretly with the plaintiff's on site local manager, Sidney Sherman, with a view to having him take over the management of Swiss House as the agent of the defendant. These negotiations were not disclosed to plaintiff. However, Sherman was a mere at will employee under no contractual obligation to the plaintiff and, so far as was shown in this record, was free to negotiate a better employment for himself on the assumption which he could properly entertain that plaintiff was about to lose the agency. Whether the defendant employer's obligations to its agent, the plaintiff, were breached cannot be resolved on this application.

After defendant secured Sherman's agreement to manage Swiss House, on May 15, 1975 Sherman undertook to organize a corporate vehicle named Sherman Management Corporation, Inc., capitalized at $500 in which he and his

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wife were the sole stockholders. On May 20 Sherman signed an agency contract with the defendant. On May 21 the defendant gave notice to plaintiff of cancellation of the relationship, and on May 30 defendant signed the agency agreement with Sherman Management Corporation, Inc.

The plaintiff contends that it had an oral agreement for management of the facilities for a two-year term covering the period when no written arrangement was in effect. The credible evidence does not substantiate this contention. What appears to have happened is that the commercial impetus to keep going oblivious to the contractual void was what kept the parties together between September 26, 1973 and the present date -- not a contract, either oral or written.

The defendant's letters of August 1, 1974 and May 21, 1975 confusingly speak of the "Agreement," and the "Agreement of December 26, 1972" as those which were being terminated -- yet there was no factual vitality in the references. The practical construction of the defendant as to the existence of some arrangement that needed termination leads only to conjecture and speculation as to the application thereof.

The fundamental basis of contract is a meeting of minds of the parties. An assent to contract must be

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manifested by overt acts. While assent neednot be expressed in words or in writing, the assent must be unequivocally referable to the terms of the offer or counter offer. The law construes both acts and words as having the meaning which a reasonable person would put on them in view of the facts and circumstances. No credible evidence has been presented of such an assent to a management contract relating to Swiss House for any period beyond December 25, 1973.

Consideration of whether an injunction should issue this early begins with the proposition that injunctive relief is an extraordinary remedy. Injunctive relief in advance of the trial is available only to the plaintiff who cannot be adequately compensated by money damages. The function of a preliminary injunction is to preserve, as best as is possible, the status quo pending a trial on the complaint which will determine if a permanent injunction should issue.

The burden which the plaintiff must satisfy to be entitled to this extraordinary relief is clear likelihood of success on the law and the facts then available and possible irreparable injury, or sufficiently serious questions on the merits making them fair ground for litigation and a balance of the equities tipping decidedly

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in favor of preliminary relief.

In the exercise of the Court's discretion and on the facts and circumstances herein as credited by the Court, the plaintiff fails to satisfy these requirements. There is no clear likelihood of plaintiff's ultimate success. The injury does not appear to be irreparable and an adequate remedy at law for damages appears sufficient. It cannot be said with assurance that there are sufficiently serious questions on the merits making them fair ground for litigation, and the balance of the equities certainly does not on this record and the credible proofs tip decidedly in favor of preliminary relief.

The motion for a preliminary injunction must be and is accordingly denied in all respects.

The foregoing shall constitute the Court's findings and conclusions in accordance with Federal Rules of Civil Procedure 52(a).

So ordered.

Milton Pollack, District Judge

DEPOSITION OF JAMES BICKLE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

RESTAURANT ASSOCIATES INDUSTRIES, INC.,

Plaintiff,

-against- 75 Civ. 3018

ANHEUSER-BUSCH, INC.,

Defendant.

-and-

SIDNEY SHERMAN and SHERMAN MANAGEMENT CORP., as additional defendants because they are or may be needed for an adjudication pursuant to FRCP 19.

----------x

Deposition of defendant ANHEUSER-BUSCH, INC., by JAMES BICKLE, taken by plaintiff pursuant to stipulation, at the offices of Dornbush, Mensch & Mandelstam, Esqs., 22 East 40th Street, New York, New York 10016, on February 23, 1976 at 10:10 a.m., before Donna A. Metz, a Shorthand Reporter and Notary Public of the State of New York.

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APPEARANCES:

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IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties herein that the filing of the within deposition be waived, that such deposition may be signed and sworn to before any officer authorized to administer an oath with the same force and effect as if signed and sworn to before the officer before whom said deposition is taken.

IT IS FURTHER STIPULATED AND AGREED that

all objections, except as to form, are reserved to the time of trial.

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MR. SCHAEFFER: This deposition is being held pursuant to stipulation between the parties in accordance with Rule 29 of the Federal Rules of Civil Procedure.

Plaintiff is taking the deposition of defendant Anheuser-Busch, Inc., by James R. Bickle, as managing agent of the defendant and in accordance with Rule 32 plaintiff intends to offer either part or all of the testimony of the deposition at the

trial of this matter.

Do you have any statement?

MR. KHEEL: I have no statement.

J A M E S B I C K L E, called as a witness, being first duly sworn by the Notary Public (Donna A. Metz), testified as follows:

EXAMINATION BY

MR. SCHAEFFER:

Q What is your name and address?

A James Bickle, 13267 Windygate Lane, Creve Coeur, Missouri 63141.

Q Mr. Bickle, you are presently employed by the defendant Anheuser-Busch, Inc.; is that correct?

A Yes.

Q In what capacity are you presently employed?

A I am director of merchandising.

Q When were you first employed by the defendant?

A March of 1971.

Q Can you tell me what position you originally held with the defendant at the time you were employed?

A I was merchandise manager at Houston, the Houston facility.

Q Then your subsequent positions with Anheuser-Busch?

A In November of 1971 I went to St. Louis as the director of merchandising for all of the Busch Garden operations.

Q Has your position changed since November of 1971?

A Yes, it has.

Q In what respect?

A In March of 1974 I assumed responsibilities officially for food and beverage operations in Busch Gardens in addition.

Q In addition to your position as director for merchandising for Busch Gardens?

A Right.

Q Would this be for all three of the Busch Gardens facilities?

A Correct.

Q They are located, respectively, in Tampa, Florida, Los Angeles, California--

A Yes.

Q --and Williamsburg, Virginia; is that correct?

A Right.

Q Is your office located in the executive offices of Anheuser-Busch in St. Louis, Missouri?

A Yes.

Q But did you have occasion and have you had occasion since the time of your employment as director of merchandising for the Busch Gardens division to visit at the various sites of the Busch Gardens, the three respective sites?

A Yes.

Q Mr. Bickle, to whom within Anheuser-Busch do you presently report?

A To Mr. Thurman, the general manager of Busch Gardens division.

Q His first name?

A Bill.

Q In November of 1971 when you were made director of merchandising for the Busch Gardens division, to whom did you report at that time?

A At that time I reported to Mr. Vas ~~Diaz~~ Dias, the director of operations.

Q Until when did you report to Mr. Vas ~~Diaz~~ Dias?

A I believe Mr. Vas ~~Diaz~~ Dias left in June of 1972. At that time I reported to Mr. Bender.

Q Would that be Richard S. Bender?

A Right.

Q Was he a vice president of Anheuser-Busch?

A Yes.

Q Until when did you report to Mr. Bender?

A Until Mr. Long took over Mr. Bender's function. I believe that was September or October of 1972.

Q Would that be Dennis Long?

A Yes.

Q Did you then report to Mr. Long?

A Yes.

Q When did you start reporting to Mr. Thurman as opposed to Mr. Long?

A March of 1974.

Q With respect to the operations of Busch Gardens in Tampa, Florida, do you report to Mr. Long as well as Mr. Thurman?

A Well, Mr. Long is Mr. Thurman's superior. The channel of command is through Mr. Thurman. But I do have occasion to have direct contact with Mr. Long.

Q Would that have been the case as well in or about June of 1973?

A Yes.

Q What position does Mr. Long hold with the defendant?

A He is divisional vice president over three operating divisions.

Q Which divisions are they?

A Industrial products, Busch Gardens and Busch properties.

Q Mr. Bickle, are you familiar with the management committee of Anheuser-Busch, Inc.?

A Yes.

Q Can you tell me what the function of that committee is?

A Primarily, it ~~means~~ meets to consider major capital expenditures and major corporate decisions.

Q Going back to May of 1975, were you a member of that management committee?

A No, I wasn't.

Q Was Mr. Long a member of that committee?

A I don't know.

Q Is Mr. Busch, III a member of that committee?

A I believe he is, yes.

Q Is that committee composed of a number of vice presidents of the various divisions of Anheuser-Busch, Inc.?

A Yes.

Q As well as others?

A Yes.

Q Was that committee in existence in June of 1973?

A As far as I know.

Q Was it in existence in September of 1973?

A I would assume it was.

Q Mr. Bickle, I show you a document which has previously been marked as Plaintiff's Exhibit 5 in the United States District Court for the Southern District of New York on July 8, 1975. It is an agreement dated December 8, 1972 between Anheuser-Busch, Inc. and Restaurant Associates Industries, Inc.

You have previously seen this agreement, have you not?

A Yes.

Q Had you read that agreement, Mr. Bickle, prior to September of 1973?

A Yes.

Q Can you tell me when you first reviewed the provisions and terms of that agreement, Plaintiff's Exhibit 5?

A No, I can't say.

Q Would it have been prior to June of 1973?

A It's possible.

Q Mr. Bickle, calling your attention to page 7 of Plaintiff's Exhibit 5, paragraph 4 (b), that agreement or provision of the agreement contains a provision for

automatic renewal of this agreement; is that correct?

A Yes.

Q Putting aside the question of automatic renewal of the contract, can you tell me what the expiration date of Plaintiff's Exhibit 5 for identification was subject to the automatic renewal clause?

A The expiration date of the contract, two years after the commencement date.

Q I am sorry?

A Two years after the commencement date.

Q Pursuant to paragraph 1(a) on page 2 of Plaintiff's Exhibit 5, the commencement date is a ~~designed~~ defined day being December 26, 1971; is that correct?

A Correct.

Q So, accordingly, the expiration date subject to the automatic renewal clause was ~~September 26,~~ December 25, 1973; is that correct?

A Correct.

Q Mr. Bickle, were you aware prior to September 17, 1973 that in order for Anheuser-Busch to terminate Plaintiff's Exhibit 5 it had to serve notice of that termination pursuant to the provisions of Plaintiff's Exhibit 5?

A Yes.

Q Were you aware of the specific provisions of paragraph 4(b), as well as the provisions of paragraph 14 of Plaintiff's Exhibit 5 prior to September 17, 1973?

A Yes.

Q Going back to the spring and early summer of 1973, was Anheuser-Busch considering the feasibility of building a hotel or motel at Busch Gardens in Tampa, Florida adjacent to the site of the Old Swiss House in Tampa?

A Yes.

Q In that regard, were you personally engaged in any negotiations with representatives of any other company as to the management of that motel?

A Yes.

Q Specifically, were you having discussions with the Marriott chain?

A Yes.

Q Can you tell me when those negotiations commenced, that is, the negotiations between Busch and Marriott?

A I would say sometime in early 1973.

Q With whom at Marriott were you speaking?

A Among others, Mr. Charles Baker.

Q By the way, has a hotel or motel ever been built

at Busch Gardens adjacent to the Old Swiss House in Tampa, Florida?

A No.

Q Was Anheuser-Busch speaking or having negotiations with any other company as respects the management of the prospective motel or hotel to be built at Busch Gardens adjacent to the Old Swiss House other than the Marriott Corporation?

A Not to my knowledge.

Q Did Anheuser-Busch ever reach an agreement with the Marriott Corporation with respect to the management of the prospective hotel or motel to be built in Tampa, Florida adjacent to the Old Swiss House?

A No.

Q During the discussions between representatives of Anheuser-Busch and representatives of Marriott was the question of the management of the Old Swiss House considered?

A Yes.

Q Was it understood that if the Marriott Corporation were to manage--

MR. SCHAEFFER: Withdraw the question.

Q Was it understood that if a hotel or motel were built at the Old Swiss House or adjacent to the Old Swiss

House in Tampa, Florida and the Marriott chain were retained to manage that hotel or motel, that they would manage the Old Swiss House, as well?

MR. KHEEL: I think the word understood is sufficiently ambiguous; I will let him answer it, but I will object to the form of the question.

MR. SCHAEFFER: I will rephrase the question.

Q In your conversations with representatives of the Marriott Corporation, did Busch request that in the event the Marriott Corporation were retained to manage the hotel or motel to be built adjacent to the Old Swiss House, that the Marriott Corporation would also manage the Old Swiss House?

A It was requested that they consider it.

Q Did they ever render a definite answer, they being the Marriott Corporation?

A Since the motel was never built, they never rendered a definite answer as to the operation of the hotel-restaurant complex there.

Q Would it be fair to say that your discussions, the discussions of Anheuser-Busch with the Marriott Corporation as respects the management of a prospective hotel or motel or the management of the Old Swiss House

never proceeded beyond the negotiation stage? Is that a fair characterization?

A Yes.

Q While your discussions with the Marriott chain were ongoing, did Anheuser-Busch consider terminating the arrangement which it had with Restaurant Associates as respects the Old Swiss House effective December 26, 1973?

A It was considered.

Q By whom was it considered?

A It was always a point of consideration as an alternative. By whom, specifically, primarily Mr. Long and Mr. Busch.

Q Would that be Mr. Busch, Jr. or Mr. Bush, III?

A Mr. Busch, III.

Q Did you have any discussions with Mr. Busch, III about that?

A No.

Q Did you have any discussions with Mr. Long about terminating Restaurant Associates effective December 26, 1973?

A Yes.

Q Can you tell me when those discussions took place?

A Early 1973. I can't recall the exact dates.

Q Was there any discussion that took place in September of 1973 relative to that?

A As I recall, I indicated to Mr. Long that a notification was required pursuant to the terms of the contract.

Q Did you indicate that to him in writing or did you tell him that orally?

A Orally.

Q Do you recall when you told him that?

A No, I do not.

Q Do you recall what, if anything, he said to you?

A No, I don't.

Q Was there any other discussion between yourself and Mr. Long, between yourself--or between yourself and Mr. Thurman relative to the termination of Plaintiff's Exhibit 5 effective December 26, 1973?

A I am sure there were some discussions. I don't recall specific discussions.

Q Did Mr. Long ever tell you that Anheuser-Busch intended to terminate its relationship with Restaurant Associates effective December 26, 1973?

A I don't recall.

Q Did you ever tell Mr. Long that it was your

opinion that the relationship between Restaurant Associates and Anheuser-Busch should be terminated effective December 26, 1973?

MR. KHEEL: You are using the term relationship and there is obviously a contractual relationship and there is the fact that they were operating the facility and the Busch Gardens.

I think that perhaps you should distinguish in your question to the witness whether you mean the termination of the contractual relationship or the termination of the operational relationship.

MR. SCHAEFFER: I will withdraw that question in deference to the objection.

Q Did you, Mr. Bickle, ever tell Mr. Long that it was your opinion that Anheuser-Busch should terminate the agreement, Plaintiff's Exhibit 5, with Restaurant Associates effective December 26, 1973?

A I don't recall making that statement to Mr. Long.

Q Did you ever, as a matter of fact, suggest to the contrary, that Restaurant Associates should not be terminated pursuant--

MR. SCHAEFFER: I will withdraw that ques-

t[illegible]..

Q Did you, Mr. Bickle, prior to September 24, 1973 recommend to Mr. Long that Anheuser-Busch not terminate Plaintiff's Exhibit 5 effective December 26, 1973?

A No, I didn't.

MR. SCHAEFFER: Can you mark this as Plaintiff's Exhibit 19 for identification.

(Copy of one-page document entitled "From the Desk of James R. Bickle" dated 6/20 marked Plaintiff's Exhibit 19 for identification, as of this date.)

BY MR. SCHAEFFER:

Q Mr. Bickle, I show you Plaintiff's Exhibit 19 for identification, which is a copy of a document which has imprinted on the top "From the Desk of James R. Bickle," the name Denny and the date 6/20. And it is signed by Jim.

I ask you to read Plaintiff's Exhibit 19 for identification.

MR. KHEEL: While he is doing that, for the record, am I correct that your numbers start with the last exhibit marked at trial, at the hearing?

MR. SCHAEFFER: Correct.

MR. KHEEL: These documents that you made

reference to now, Exhibit 19, and presumably some others, are copies of documents we furnished you?

MR. SCHAEFFER: That is correct. This is a copy of a document which I was furnished by you pursuant to document inspection.

MR. KHEEL: Have you read it?

THE WITNESS: Yes.

BY MR. SCHAEFFER:

Q Mr. Bickle, can you tell me the circumstances under which you wrote this--

MR. SCHAEFFER: Withdrawn.

Q Does your signature appear on Plaintiff's Exhibit 19 for identification?

A Yes.

Q Did you prepare this memorandum on or about June 20, 1973?

MR. KHEEL: For the record, Mr. Schaeffer, are you suggesting that you know that it is 1973 or are you asking that, because I think you may be wrong.

MR. SCHAEFFER: I am asking Mr. Bickle whether or not that is the case.

A I think this may have occurred in 1973.

Q Do you know, Mr. Bickle, whether or not that

was prepared on or about June 20, 1973, on or about June 20, 1974 or whether or not it pertains to another year altogether?

A My recollection is that it was prepared in 1974.

Q The document states:

"This would simplify a great many problems in our upcoming takeover of the snack stands. I will spell out the whole case to you in writing next week."

Regardless of whether this document was made in 1973 or 1974, can you tell me whether or not you ever sent a subsequent writing to Mr. Long, the writing which is referred to in Plaintiff's Exhibit 19 for identification?

A I did submit a summary of the situation to Mr. Long. I can't pinpoint the date.

Q Would it have been within a week after the time you had dictated and signed this memorandum?

A I don't know.

MR. KHEEL: Off the record.

(Discussion off the record.)

BY MR. SCHAEFFER:

Q Mr. Bickle, I show you a letter dated August 1, 1974 sent by you to Mr. Verne Clements, previously marked

as Plaintiff's Exhibit 9 in the United States District Court of the Southern District of New York on July 8, 1973.

You sent that letter to Mr. Clements?

A Yes.

Q Mr. Bickle, can you tell me what the purpose of that letter was?

A Since Restaurant Associates had refused to sign the draft amendment agreement that had been sent to them, this letter was an attempt on my part to set the stage for a new round of negotiations.

Q That letter states that as provided in our agreement we are hereby giving written notice of proposed changes in the upcoming operating contract with Restaurant Associates Industries, Inc.

The word agreement or the letter "A" in the word is capitalized.

Can you tell me what agreement you were referring to in that letter?

A At that time I didn't know what the legal status of our arrangement with Restaurant Associates was.

THE WITNESS: Would you restate the question?

(Record read.)

A Obviously, we had some sort of ongoing understanding. I couldn't say exactly what I meant by the word agreement. It was just a convenient term.

Q Were you identifying a written agreement or an oral agreement?

A My understanding at that point was that, since RA had refused to sign the written agreement, there was no contractual agreement then in force.

Q At the time that you wrote that letter on August 1, 1974, was it your understanding that there was or was not a contractual arrangement pursuant to which Restaurant Associates would manage the Old Swiss House and the other areas at Busch Gardens, the snack bar areas, until November 4th of 1974?

MR. KHEEL: Can you repeat that question.

(Record read.)

A There was an understanding to that effect.

Q Can you tell me when that understanding was reached?

A At the meeting in 1973 with Mr. Long and myself, Mr.Tolve, etc.

Q Do you know the date of that meeting?

A Not exactly.

MR. SCHAEFFER: Would you mark this as

Plaintiff's Exhibit 20 for identification.

(Copy of multi-page document entitled "Memo to File" marked Plaintiff's Exhibit 20 for identification, as of this date.)

BY MR. SCHAEFFER:

Q Mr. Bickle, I show you Plaintiff's Exhibit 20 for identification, a memo to file by Dennis Long and ask you whether or not that refreshes your recollection as to the date of your meeting with Mr. Long and Mr. Tolve.

A Apparently, it was May 17th.

Q That was the date of the meeting?

A Yes.

Q Can you tell me what understanding was reached during the course of that meeting?

A The understanding that rental percentage would be reduced in the fast food operation beginning the first of 1974, from 40% to 35%, and also that Anheuser-Busch would take active control of the fast food operations as of November 4th.

Q 1974?

A 1974.

Q Was there also an understanding that Restaurant Associates would continue to manage the Old Swiss House

through November 4, 1974?

A I don't know that that was specifically discussed. I would say that it was assumed.

Q Assumed?

MR. KHEEL: I think that was his answer.

Q Can you tell me the basis for that assumption?

A Just my interpretation.

Q That there was an agreement that Restaurant Associates was going to continue to manage the Old Swiss House and the snack bar areas through November 4, 1974; is that your understanding?

MR. KHEEL: I think that that is re-interpreting what the testimony was. I think if you read the last two questions back, which gave rise to his answer, I don't think you are being fair to him.

MR. SCHAEFFER: The witness said that this was his impression, I believe. I want to know what the basis for his impression is.

MR. KHEEL: You want to know what facts gave rise to his impression or assumption?

MR. SCHAEFFER: I think that is what I asked him.

MR. KHEEL: I will stand corrected and let the witness answer that question.

A Would you repeat the last question to me.

(Record read.)

A I knew at that time that we were going to submit a draft proposal to RA to be signed.

Q Is it your testimony that on May 17, 1973 you knew that Anheuser-Busch would be submitting a written draft proposal to Restaurant Associates changing in certain ways the terms of the previous written agreement that had existed between Restaurant Associates and Anheuser-Busch?

A That was my understanding.

Q Do you know if such a written agreement was ever prepared by Anheuser-Busch and submitted to Restaurant Associates?

A Yes.

Q Do you know what date it was submitted to Restaurant Associates?

A Early 1974. I don't recall the exact date.

Q Mr. Bickle, I show you a letter dated January 28, 1974, attaching an enclosure entitled "Amendment to Agreement," both of which documents were together marked Defendant's Exhibit B in the United States District Court for the Southern District of New York on July 8, 1975.

MR. KHEEL: We stipulate that you can refer

to those exhibits by way of hearing exhibits such-and-such and save yourself some time.

MR. SCHAEFFER: No problem there.

BY MR. SCHAEFFER:

Q I ask if, in fact, that is the written proposed agreement which you referred to in your answer to the last question?

A Yes.

Q Mr. Bickle, on or about November 7th of 1974, did you receive a letter signed by Miss ~~Naomi~~ Leone Bernstein of Restaurant Associates and attorney for Restaurant Associates enclosing with it a draft proposed agreement between Restaurant Associates and Anheuser-Busch?

A Yes.

Q Was a copy of that letter and of that proposed agreement marked at the hearing as Plaintiff's Exhibit 7?

A Yes.

Q Did you read Plaintiff's Exhibit 7 on or about November 7, 1974?

A Yes.

Q Did you read the entire agreement?

A Yes.

Q Did you thereafter prepare a memorandum with respect to that agreement?

A Yes.

Q Did you, in fact, draft a letter to Restaurant Associates with respect to certain provisions contained in the agreement and annexed as Plaintiff's Exhibit 7?

A Yes.

MR. SCHAEFFER: Would you mark this as Plaintiff's Exhibit 21.

(Copy of three-page letter dated December 10, 1974 to Ralph Tolve from James Bickle marked Plaintiff's Exhibit 21 for identification, as of this date.)

BY MR. SCHAEFFER:

Q Marked as Plaintiff's Exhibit 21 for identification is a document in letter form ~~between~~ addressed to Mr. Ralph Tolve, signed by James R. Bickle, three pages, and dated December 10, 1974.

Mr. Bickle, did you prepare Plaintiff's Exhibit 21 for identification?

A Yes.

Q Did you ever send it to Mr. Tolve?

A No.

Q Does Plaintiff's Exhibit 21 for identification contain a written review by you of certain provisions of Plaintiff's Exhibit 7 for identification marked at the

hearing?

A Yes.

Q In Plaintiff's Exhibit 21 for identification, did you set out for Mr. Tolve certain provisions which were objectionable to Anheuser-Busch which had been included in Plaintiff's Exhibit 7?

A Yes.

Q Prior to preparing Plaintiff's Exhibit 21 for identification, had you read all of Plaintiff's Exhibit 7? I am referring to the proposed agreement and the letter which Miss Bernstein had sent, all of which were marked together at the time of the hearing.

A I reviewed Exhibit 7 and then forwarded it to the legal department for a legal interpretation of the changes.

Q Did the legal department send you a memorandum or some other writing setting out the changes that Miss Bernstein had made in Plaintiff's Exhibit 7 in comparison with another draft that had previously been submitted by Anheuser-Busch to Restaurant Associates?

A Yes.

Q Do you have a copy of that memorandum with you?

MR. KHEEL: Off the record.

(Discussion off the record.)

MR. KHEEL: Would you read the question back.

(Record read.)

A No.

Q Plaintiff's Exhibit 7 was submitted to the legal department at Anheuser-Busch for its review, was it not?

A Yes.

Q And they, in whatever form, made certain comments as respects Plaintiff's Exhibit 7, did they not?

A Yes.

Q Did you in your letter, Plaintiff's Exhibit 21, the letter that was never sent to Mr. Tolve, incorporate some of the remarks that had been offered by the legal department, as well as your own observations with respect to Plaintiff's Exhibit 7?

A Yes.

Q Does that letter, Plaintiff's Exhibit 21, set forth all of those provisions of Plaintiff's Exhibit 7 which Anheuser-Busch found to be objectionable?

A So far as I know.

Q Mr. Bickle, I call your attention to Plaintiff's Exhibit 7, page 15, paragraph Roman numeral XVIII, and I am reading from the beginning of that paragraph:

"The parties acknowledge that they entered

into a management agreement dated December 8, 1972 (Prior Agreement) pursuant to which Restaurant Associates was retained to manage on behalf of Busch all the food and beverage facilities, including the restaurant in Busch Gardens, and that the Prior Agreement by its terms would have expired December 25, 1973.

"The parties further acknowledge and agree that Associates has continued to manage such food and beverage facilities subsequent to December 25, 1973 pursuant to all the terms, covenants and conditions contained in the Prior Agreement except that, as effective December 26, 1973, the Prior Agreement is amended as follows:"

It then goes on to cite approximately a page and a half of further paragraphs.

Had you read the language which I have just stated for the record prior to preparing Plaintiff's Exhibit 21 for identification, your letter to Mr. Tolve, which was never sent?

A Yes.

Q Was it your understanding, Mr. Bickle, that the language which I have just read and paragraph XVIII of Plaintiff's Exhibit 7, pages 15, 16 and part of 17, ac-

curately set forth the relationship between Restaurant Associates and Anheuser-Busch as of November 7, 1974?

A As of November 1974, I didn't know what the relationship was in a legal sense.

MR. SCHAEFFER: Would you mark this as Plaintiff's Exhibit 22 for identification.

Plaintiff's Exhibit 22 for identification is initially a note from one W. Randolph Baker dated August 8, 1973 to Rich, stating:

"Attached is my rewrite of Denny's memo to Busch concerning the Tampa situation. I would appreciate your comments."

There is an attachment, as well, of six pages.

For purposes of the exhibit, the short memorandum page, as well as the six-page memorandum, will all be considered as Plaintiff's Exhibit 22 for identification.

(Note from Mr. Baker to Rich dated August 8, 1973 and attachment of six pages marked Plaintiff's Exhibit 22 for identification, as of this date.)

BY MR. SCHAEFFER:

Q Mr. Bickle, have you seen Plaintiff's Exhibit 22

for identification before today, and by all means take the time that is required to look at the exhibit.

A I don't believe I have seen this rewrite. I believe I saw the original memo, a copy.

Q Was the original memo prepared, as you recall, by Mr. Long?

A Yes.

Q You have never seen the rewrite by Mr. Baker?

A I don't recall seeing it.

Q Can you tell me what the original memo, a copy of which I don't have and which hasn't been furnished to me, said? This is the memo prepared by Mr. Long.

A Not specifically. I can't recall what it said.

Q Did it set forth certain alternatives with respect to the management of the Old Swiss House?

A Yes.

Q Do you recall what those alternatives were?

A I assume they are the same as in the rewrite.

No, I don't recall.

Q You don't recall?

A Specifically, no.

Q Was one of the alternatives to retain Restaurant Associates as manager of the Old Swiss House?

A I would assume, yes.

Q Did that alternative include the provision that Restaurant Associates, the contract with Restaurant Associates, Plaintiff's Exhibit 5, would not be terminated?

MR. KHEEL: Are you now asking him what Long's memo included?

MR. SCHAEFFER: Yes, that's correct. I don't have a copy of Long's memo and I am hopeful tomorrow in St. Louis I will be provided with one.

MR. KHEEL: I don't recall seeing one.

THE WITNESS: May I have the question again, please?

(Record read.)

A I don't know.

Q With reference to Plaintiff's Exhibit 22, does Mr. Baker's memorandum refresh your recollection as to what Mr. Long's memorandum said?

Would you like to look at Plaintiff's Exhibit 22 for identification?

A O.K.

Q Feel free. (Handing)

MR. KHEEL: I think the witness has now addressed himself to the last page of Exhibit 22, which contains a list of "three basic alternatives, numbers 1, 2 and 3 are hereafter set forth." He

has reveiwed it.

As I understood what you were asking, you were asking as to whether this refreshes his recollection as to what basic alternatives were set forth by Mr. Long.

Q Were those same three basic alternatives set forth in the Long memorandum which preceded the Baker rewrite?

A I would assume so.

Q Do you recall that to be the case?

A My recollection is that it's the case.

Q Subsequent to August 8, 1973, did you have a conversation with Mr. Long or any other form of communication during which Mr. Long informed you that Anheuser-Busch had elected the alternative of continuing its relationship pursuant to Plaintiff's Exhibit 5 with Restaurant Associates?

A Pursuant to Plaintiff's Exhibit 5, Exhibit 5 is the contract.

Q The contract dated December 1972.

A I don't recall such a discussion.

Q Did you have any discussion with Mr. Long after August 8, 1973 and prior to October 1, 1973 at which the question of whether or not Restaurant Associates would

be retained pursuant to Plaintiff's Exhibit 5 was discussed?

A Yes.

Q When did that meeting take place, ~~it~~ if it was a meeting?

A I don't recall. There were continuous discussions on and off.

Q These were oral communications?

A Yes.

Q What, if anything, did you say to Mr. Long and what, if anything, did he say to you?

A Throughout 1973, we discussed many possible alternatives. I don't recall specifically what was said.

Q Mr. Bickle, as of September 17, 1973, had Anheuser-Busch reached any decision as respects whether or not to continue Restaurant Associates ~~and management~~ as manager of the Old Swiss House pursuant to the provisions of Plaintiff's Exhibit 5?

A Not to my knowledge.

Q As of September ~~19,~~ 17, 1973, had Anheuser-Busch made a determination to remove Restaurant Associates as manager of the Old Swiss House pursuant to Plaintiff's Exhibit 5?

A Not to my knowledge.

Q To your knowledge, was any decision reached prior to September 24, 1973 as respects the continuation--as respects the termination of Plaintiff's Exhibit 5?

A The understanding was that we would attempt to renegotiate.

Q Had a determination been reached by Anheuser-Busch prior to September 24, 1973 to terminate Plaintiff's Exhibit 5?

A Like I said, not that I am aware of.

Q Would you have been made aware of such a determination?

A I don't know.

Q Did your job at that time as director of merchandising for Busch Gardens include reponsibility for, among other things, certain aspects of management of the Old Swiss House?

A Yes.

Q If, in fact, Restaurant Associates were going to be terminated at the Old Swiss House effective December 26, 1973, would it be fair to say that you would have been advised of such a decision?

MR. KHEEL: That is a different question. You asked him whether he was aware of the termination of the contract as opposed to the termination of

the relationship and now you are switching on him.

MR. SCHAEFFER: I don't recognize that I am switching anything. I can assure you I have not been doing it consciously.

(Record read.)

MR. SCHAEFFER: I will withdraw the last question.

BY MR. SCHAEFFER:

Q Would it be fair to say, Mr. Bickle, that if Anheuser-Busch were going to terminate Plaintiff's Exhibit 5, the agreement of December 8, 1972 with Restaurant Associates, that you would have been advised of that termination?

A Yes.

Q Were you so advised?

A I knew of the termination letter that had been sent. So in that respect, I was advised.

Q Are you now referring to a letter dated September 24, 1973 from Mr. Long to Mr. Tolve?

A Yes.

Q Were you told with respect to that letter that that letter was going to be sent prior--were you told prior to September 24, 1973 that that letter was going to be sent by Mr. Long?

A Yes.

Q Did you have a discussion with Mr. Long as respects that letter?

A Yes.

Q Can you tell me who else was present?

A I believe it was a telephone discussion.

Q Can you tell me when it took place, approximately?

A I assume shortly before Setpember.

Q Can you tell me what, if anything, you said to Mr. Long and what, if anything, he said to you?

A I reminded Mr. Long that there was a requirement that an official notice be sent whereby the existing contracts would terminate unless it could be renegotiated.

Q Is that what you told Mr. Long?

A Yes.

Q What, if anything, did Mr. Long say to you?

A He said he would check with the legal department and see that the notice was sent.

Q Was a decision thereby reached to terminate the contract dated December 8, 972?

A If a subsequent agreement could not be reached, I think that was understood.

Q Did Anheuser-Busch make arrangements at or about the time it reached that determination for another entity other than Restaurant Associates to manage the Old Swiss House and the snack bars at Busch Gardens?

A No.

Q Was it negotiating at that time with any other entity to manage the Old Swiss House effective December 26, 1973?

A There may have been some discussions going on with Marriott still at that time, but not specifically in relation to taking over the Swiss House as of the end of 1973.

Q Did you have any discussion with Mr. Long or with Mr. Thurman as respects who would manage the Old Swiss House and the snack bar areas at Busch Gardens upon the termination of Plaintiff's Exhibit 5?

A In 1973?

Q That's correct.

A I had discussions with Mr. Long in regard to who might manage the fast food operations.

Q Who was that?

A At that time we were considering the possibility of having Burl Purvis to manage the fast food operation.

Q With respect to the Old Swiss House, were there

any discussions as to who was going to manage the Old Swiss House after December 26, 1973?

A Not to my recollection.

MR. SCHAEFFER: Would you mark this as Plaintiff's Exhibit 23 for identification.

(Copy of one-page letter dated September 17, 1973 to Verne Clements from James R. Bickle marked Plaintiff's Exhibit 23 for identification, as of this date.)

BY MR. SCHAEFFER:

Q Mr. Bickle, I show you Plaintiff's Exhibit 23 for identification and ask if it is a copy of a letter which you sent to Mr. Verne Clements on or about September 17, 1973.

A Yes.

Q Was that letter sent on or about September 17, 1973?

A Yes.

Q Does that letter suggest that you and Mr. Clements met during the month of October to discuss certain changes in the agreement between Restaurant Associates and Anheuser-Busch?

A Yes.

Q Can you tell me, Mr. Bickle, pursuant to para-

graph 4(b) of Plaintiff's Exhibit 5, were you aware of the date at which Anheuser-Busch had to notify Restaurant Associates of its intent to terminate?

A Yes.

Q What date was that?

A Ninety days before the expiration.

Q The expiration date was December 26, 1973?

A Yes.

Q That would be approximately September 24, 1973?

A Yes.

Q You suggested in your letter, Plaintiff's Exhibit 23 for identification, that you meet with Mr. Clements in October; is that correct?

A Yes.

Q Can you tell me what the purpose of that letter was, Plaintiff's Exhibit 23 for identification?

A As the letter explains, it was to review some points with Mr. Clements relating to a draft amendment that we were going to propose.

Q As of September 17, 1973, Mr. Bickle, when you prepared and sent Plaintiff's Exhibit 23 for identification, was it the intention of Anheuser-Busch to terminate Plaintiff's Exhibit 5?

A That was not the intent of this letter.

Q That was not my question.

MR. SCHAEFFER: Would you read back the question, please.

(Record read.)

A I would say yes, if a subsequent meeting of the minds couldn't be accomplished.

Q Does that letter, Plaintiff's Exhibit 23, say that?

A No, it does not.

Q It suggests a meeting in October; is that correct?

A Right.

Q After the time the notice would have to be served pursuant to Plaintiff's Exhibit 5 in order to effectively terminate the contract?

A Right.

(A short recess was taken.)

BY MR. SCHAEFFER:

Q By the way, Mr. Bickle, with respect to Plaintiff's Exhibit 23 for identification, you sent a copy of that letter to Mr. Long, did you not?

A Yes.

Q After having sent the copy of the letter to Mr. Long, did you have occasion to speak with Mr. Long

between the 17th of September, 1973 and the 24th of September, 1973?

A I assume I did.

Q Do you have any specific recollection of any conversation during that period of time?

A No.

Q Do you have any recollection of having, between the 17th of September, 1973 and the 24th of September, 1973 either sending Mr. Long any form of correspondence or memo or of having received a memo or other form of correspondence from Mr. Long?

A I have no recollection.

Q I now show you a document previously marked as Defendant's Exhibit A at the hearing on the preliminary injunction, a letter from Mr. Long to Mr. Tolve dated September 24, 1973 and ask whether or not you received a copy of that letter.

A Yes.

Q After having received a copy of that letter, did you have a discussion with Mr. Long as respects that letter?

A I don't recall any specific discussion with Mr. Long in respect to this particular letter.

Q Had Mr. Long told you prior to your receipt of

Defendant's Exhibit A that you were to contact Mr. Clements in an attempt to work out certain modifications to Plaintiff's Exhibit 5?

A I don't recall whether Mr. Long requested I contact Mr. Clements.

Q In Plaintiff's Exhibit 23, the letter that you wrote to Mr. Clements, you suggest that a meeting with Clements be held in October to discuss certain changes in the agreement between Anheuser-Busch and Restaurant Associates; is that correct?

A Right.

Q Did you suggest that meeting at your own initiative or had you discussed it with Mr. Long?

A As I recall, I suggested it at my own initiative.

Q But you did send a copy of that letter, Plaintiff's Exhibit 23, to Mr. Long?

A Yes.

Q Did you meet with Mr. Clements during October of 1973?

A I would assume I did. I don't recall specifically.

Q Do you recall what you discussed with Mr. Clements at your meeting or meetings which took place after

September 24, 1973?

A Not specifically.

Q Can you tell me what you do recall about those meetings, who else was present, what you said and what the others present at those meetings said?

A As I recall, there was no one present but myself and Mr. Clements.

Q Do you recall when the meeting took place?

A No.

Q Do you recall what you said? Do you recall what Mr. Clements said?

A We just continued discussions of our relative positions in regard to some points of the proposed agreement.

Q Did you reach agreement with Mr. Clements as respects the provisions of a new agreement?

A We advanced to the point that I felt I could prepare a draft amendment. So, in that respect, we did agree.

Q Can you tell me those points upon which you and Mr. Clements agreed?

A I would assume they are the points that are spelled out in the draft amendment.

Q Without reference to the draft amendment, do

you have any specific recollection of what points you and Mr. Clements reached agreement on as respects a new operating agreement between Restaurant Associates and Anheuser-Busch?

A As I recall, we discussed primarily the technicalities involved in the take-over of the fast food in 1974.

Q Was it agreed that Anheuser-Busch would take over the fast food operation as of November 4, 1974?

A Yes.

Q Was it agreed with respect to the fast food operation, Restaurant Associates would pay as rent to Anheuser-Busch between January 1, 1974 and November 4, 1974, 35% instead of 40% of the gross sales?

A Yes.

Q Did you agree with Mr. Clements that Restaurant Associates would remain in supervision of the fast food operations of Busch Gardens in Tampa through November 4, 1974?

A Yes.

Q Did you agree with Mr. Clements that Restaurant Associates would continue to manage the Old Swiss House in Busch Gardens in Tampa through November 4, 1974?

A I don't recall that we specifically discussed

the Old Swiss House in this regard.

Q Did you reach any agreement with Mr. Clements after September 24, 1973 with respect to the management of the Old Swiss House by Restaurant Associates?

A I proposed a draft amendment that spelled out our interpretations of an agreement. My proposal to Mr. Clements was contained in that draft amendment.

Q That draft amendment followed negotiations and discussions between yourself and Mr. Clements; is that true?

A Yes.

Q During those negotiations and discussions, you and Mr. Clements agreed on certain points; isn't that true?

A Yes.

Q Is it your testimony that those points are covered in the draft agreement which you submitted on or about January 28, 1974?

A Yes.

Q Did you ever in your discussions with Mr. Clements between September 24, 1973 and January 28, 1974 inform Mr. Clements or speak with Mr. Clements about the fact that Anheuser-Busch served notice of termination pursuant to Mr. Long's letter of September 24, 1973?

MR. KHEEL: This is an oral communication, I assume you mean?

MR. SCHAEFFER: Oral or written. I assume that the communications were oral.

MR. KHEEL: The draft agreement dated January 28th makes a recitation to that effect. So, excluding that, I assume--

MR. SCHAEFFER: Excluding the language used in Defendant's Exhibit B.

A No.

Q Mr. Bickle, is it your testimony that it was your understanding as of September 24, 1973 that Anheuser-Busch had terminated Plaintiff's Exhibit 5?

A As of that date, my understanding was Anheuser-Busch would terminate that existing agreement and attempt to renegotiate a new one.

Q In the event no new agreement could be renegotiated?

A Then that agreement was terminated.

Q So, then, it is your testimony that it was your understanding, upon recept of a copy of Mr. Long's letter to Mr. Tolve dated September 24, 1973, that Anheuser-Busch had terminated Plaintiff's Exhibit 5?

A It was my understanding that the agreement

would terminate as of the expiration date.

Q As of December 26, 1973?

A Yes.

Q Was that--did that continue to be your understanding as of December 11, 1973?

A Yes.

MR. SCHAEFFER: Would you mark this for identification. It is an interoffice correspondence of Anheuser-Busch, Inc., a memorandum dated December 11, 1973, ~~for~~ from Mr. Bickle to Mr. Long.

(Interoffice memorandum from Mr. Bickle to Mr. Long dated December 11, 1973 marked Plaintiff's Exhibit 24 for identification, as of this date.)

BY MR. SCHAEFFER:

Q Mr. Bickle, I show you Plaintiff's Exhibit 24 for identification and ask you whether or not you sent the original of this memorandum to Mr. Long on or about December 11, 1973.

A Yes.

Q I ask you to read the first sentence of that memorandum:

"A major change which we wanted to incorporate into the new contract is a revision of the

expiration date, which is currently set at December 26, 1974."

A Right.

Q Did you send that memorandum to Mr. Long?

A Yes.

Q Was it your understanding as of December 11, 1973 that the expiration date of the new contract--of the contract with Restaurant Associates was December 26, 1974?

A This is referring to the draft amendment sent at the beginning of 1974?

Can we see the expiration date of the draft amendment that was sent the beginning of 1974?

Q You are now referring to the draft amendment which was prepared by the attorneys for Anheuser-Busch and sent by you to Verne Clements on January 28, 1974?

A Yes.

Q I show you a copy of Defendant's Exhibit B from the hearing and ask if that is the amendment to the agreement to which you are now referring?

A Yes.

Q Had Defendant's Exhibit B, Mr. Bickle, been prepared by December 11,1973, the date upon which you sent the memorandum to Mr. Long?

A No. I was in the process of preparing it.

Q Were you preparing it personally?

A Primarily, the legal department was, but with my input.

Q Had it been reduced into a draft by December 11, 1973?

A I don't know.

Q You previously have testified in connection with your discussions with Mr. Clements that the date you had been discussing with Mr. Clements as respects the expiration of management was November 4, 1974 and not December 26, 1974; is that correct?

MR. KHEEL: I missed that.

Could you read the question?

(Record read.)

MR. KHEEL: I will object to the form of the question. I am really not sure what he did testify to in that connection.

BY MR. SCHAEFFER:

Q Mr. Bickle, upon what basis do you state in your memorandum to Mr. Long dated December 11,1973 that the expiration date of the contract with Restaurant Associates is set at December 26, 1974?

A What I am trying to communicate here is that

December 26th had been the previous expiration date. I was proposing to Verne Clements that that be changed to November 4th to coincide with the expiration of the union contract.

Q When you say that December 26, 1974 had been the previous expiration date--

A No, I didn't say 1974. I said December 26th, the date of December 26th.

Q But you do state in that memorandum that the contract with Restaurant Associates is--the expiration date--

MR. SCHAEFFER: Withdraw the question.

Q You state in the memorandum of December 11, 1973, Plaintiff's Exhibit 24, that you wish a revision of the expiration date which is currently set at December 26, 1974; isn't that correct?

MR. KHEEL: You are reading the second part of the sentence.

MR. SCHAEFFER: I have no problem. I have already read the full sentence into the record.

MR. KHEEL: We agree that the second part of the sentence says what you say it says.

A Yes.

Q I am asking you upon what basis did you state--

did you use the language which is used in the first sentence of your memorandum to Mr. Long, December 11, 1973? What was your understanding of the state of facts as of December 11, 1973 as respects the expiration date of the contract between Restaurant Associates and Anheuser-Busch?

A In the initial stages of our discussion relating to the upcoming draft amendment to be sent, the proposed expiration date was to be--was to continue to be December 26th. That is a violation of the terms of the previous agreements whereby Restaurant Associates should not enter into any contractual obligations with any party that went beyond the expiration date of the contract.

What I was trying to accomplish here was to change the expiration date to November 4th to coincide with the expiration of the union contract.

Q Mr. Bickle, as of December 11, 1973, was it your understanding that the expiration date of your contract with Restaurant Associates was December 26, 1974?

A No.

Q That was not your understanding?

A No.

Q What was your understanding?

A My understanding was that we were in preliminary negotiations to create a draft amendment to continue the operation through 1974.

In here, I was trying to affix a termination date for that draft amendment.

Q So that, when you say in your memorandum that:

"A major change which we wanted to incorporate into the new contract is a revision of the expiration date, which is currently set at December 26, 1974..."

that portion of your memo was incorrect?

MR. KHEEL: I think his testimony and the memo were totally consistent. You may disagree with that.

MR. SCHAEFFER: I certainly do. I would like Mr. Bickle's answer to the question that I asked two back.

(Record read.)

Q You say that in your initial negotiations with Restaurant Associates as respects a new contract, the discussion of the new expiration date was originally set at December 26, 1974; is that correct?

A Yes.

Q You were trying to accomplish in your negotia-

tions with Restaurant Associates a change of that date to November 4, 1974; is that correct?

A Right, for the drafting amendment.

Q When did the negotiations as respects the expiration date commence?

A Verne Clements and I discussed the expiration date of the draft amendment in the latter part of 1973 when we had our meeting.

Q And you say that initially the date of December 26, 1974 was the one that was proposed as to the expiration date of the new contract?

A Yes. Not by us.

Q You did not propose that?

A No. It was just a point of discussion.

Q When was it that you on behalf of Anheuser-Busch first requested the November 4, 1974 expiration date for the new contract?

A As I recall, it was during my meeting with Verne Clements, November of 1973.

Q What was the reason for that requested expiration date, that is to say, the November 4, 1974 date?

A As I explained, we wanted the date of expiration of the operating agreement to coincide with the expiration date of the union contract between Restaurant

Associates and their employees.

Q By the way, after sending Plaintiff's Exhibit 24 to Mr. Long, did you receive Mr. Long's comments to the contents of that memorandum?

A If I can see the document--

Q Certainly. (Handing)

A Yes.

Q Would that have been in the marginal notes which he made on that document?

A Yes.

MR. SCHAEFFER: Would you mark this document as Plaintiff's Exhibit 25 for identification, a memorandum, interoffice correspondence, dated December 17, 1973 from James R. Bickle to Dennis P. Long.

(Interoffice memorandum dated December 17, 1973 from James R. Bickle to Dennis P. Long marked Plaintiff's Exhibit 25 for identification, as of this date.)

BY MR. SCHAEFFER:

Q I show you Plaintiff's Exhibit 25 for identification, Mr. Bickle, and ask if you sent the original of this interoffice correspondence to Mr. Long on or about December 17, 1973?

A Yes.

Q This copy contains marginal comments.

Do you know who wrote those marginal comments? Do you recognize the writing?

MR. KHEEL: For the record, I think they are different comments by different people on it. If you are referring to the one on the lefthand side--

MR. SCHAEFFER: That's correct, which appears to say, O.K., D.L., with a circle around it.

A Yes.

Q Can you tell me who wrote that?

A Mr. Long.

Q Mr. Bickle, I refer your attention to the second paragraph of that memorandum, which reads:

"In light of this and the fact that these changes could conceivably cause repercussions with the Florida ABC, I feel it might be wise to let the contract stand as is with just the negotiated changes that have been agreed upon by Verne Clements and myself with your concurrence."

Can you tell me as of December 17, 1973 what the contract provisions were that had been agreed upon

between you and Verne Clements with the concurrence of Mr. Long?

A Primarily, they were the provisions that were spelled out in our draft amendment sent in January.

Q The draft amendment was sent on or about January 28, 1974; isn't that correct?

A Yes.

Q As of December 17, 1973,had that draft amendment already been prepared?

A Notes relating to the draft amendment, I would assume. I don't think the draft amendment had been prepared.

Q Can you tell me what the terms of the contract between Restaurant Associates and Anheuser-Busch were as of December 17, 1973 and what negotiated changes had been agreed upon between you and Verne Clements, with the concurrence of Mr. Long?

THE WITNESS: Could you repeat the question.

(Record read.)

A The December 11th memo to Mr. Long spells out some of the points that were agreed to by Mr. Long. If you are asking me, can I remember each specific point, no.

Q Did Mr. Long agree that the new contract was

to have an automatic renewal clause for an additional term of one year?

A I don't think that was discussed.

Q Discussed by whom, Mr. Bickle?

A Myself and Mr. Long.

Q Had you discussed that with Mr. Clements?

A Not that I recall.

MR. SCHAEFFER: Would you mark this as Plaintiff's Exhibit 26 for identification, a document from the desk of James R. Bickle dated January 14, 1974 to Denny. There is an indication, received January 14, 1974, office of Dennis P. Long.

(Document from James R. Bickle to Dennis P. Long dated January 14, 1974 marked Plaintiff's Exhibit 26 for identification, as of this date.)

BY MR. SCHAEFFER:

Q Mr. Bickle, I show you Plaintiff's Exhibit 26 and ask whether you sent the original of Plaintiff's Exhibit 26 to Mr. Long on or about January 14, 1974.

A Yes.

Q Does that refresh your recollection as to whether or not a written draft of the new proposed agreement with Restaurant Associates had been prepared by that date?

A Obviously, it had not.

Q The draft had not been prepared by the Anheuser-Busch attorneys by January 14, 1974; is that correct?

A Yes.

MR. SCHAEFFER: Would you mark this, please, as Plaintiff's Exhibit 27. It is an interoffice correspondence of Anheuser-Busch dated January 29, 1974 from Mr. Dennis Long to Mr. August A. Busch, III.

(Interoffice correspondence dated January 29, 1974 from Mr. Long to Mr. Busch, III marked Plaintiff's Exhibit 27 for identification, as of this date.)

BY MR. SCHAEFFER:

Q Mr. Bickle, I show you Plaintiff's Exhibit 27 for identification, a copy of interoffice correspondence from Mr. Long to Mr. Busch, III, and ask whether or not you received a copy of that interoffice correspondence.

A Yes.

Q Why don't you take a moment to just look at it.

(Witness reads exhibit.)

Q The first paragraph of this memorandum states: "As you know, we have extended our con-

tract with Restaurant Associates...for the Old Swiss House and in -- Park Food Services at Tampa... through November 4, 1974. However, we still feel that the service and quality of food at Tampa is not up to our standards and it is our intention to notify Restaurant Associates on August 5, 1974 that we have a new contractor for the Swiss House..."

Did you read that memoradum on or about January 29, 1974?

A Yes.

Q Did you speak with Mr. Long or with Mr. Busch, III in connection with that memorandum in the week or two weeks or month that followed January 29, 1974?

A I am sure I did.

MR. KHEEL: As to whom?

Q Did you talk to Mr. Long?

A I am sorry, to Mr. Long. I don't talk to Mr. Busch.

Q Did you discuss the contents of that memorandum with Mr. Long?

A Briefly, yes.

Q Can you tell me what, if anything, you said to him and what, if anything he said to you?

A I advised that we not notify RA of a new con-

tractor for the Old Swiss House.

Q You adivsed Mr. Long that Restaurant Associates should be continued in management of the Old Swiss House?

A Yes.

Q When did you so advise Mr. Long of that?

A Well, I believe that is contained in my June memo that you brought out earlier.

Q That June memo you previously testified you felt was June of 1974?

A Right.

Q This is January of 1974.

A I am sorry.

What was your question?

MR. KHEEL: The question is limited to the first month, I think, after this memo, Exhibit 27, rather than any comments subsequent to that initial period.

MR. SCHAEFFER: I think that is correct.

A Right.

Q Did you have any discussions with Mr. Long between January 27, 1974 and March 1, 1974 relative to that memorandum, Plaintiff's Exhibit 27?

A Yes.

Q Can you tell me what was said during those con-

versations?

A I felt that we should not notify RA by August 5th that we had a new contract for the Old Swiss House.

Q Mr. Bickle, as of January 29, 1974, there was--

MR. SCHAEFFER: Withdraw that question.

Q Is it correct, Mr. Bickle, that the last written agreement which was signed by both Restaurant Associates Industries, Inc. and Anheuser-Busch, Inc. is Plaintiff's Exhibit 5?

A Yes.

Q Can you tell me pursuant to the terms of what agreement had Restaurant Associates' contract been extended through November 4, 1974?

MR. KHEEL: Now you are asking the witness what Mr. Long had in mind when he wrote the sentence?

Q Do you know what Mr. Long had in mind when he wrote the sentence, Mr. Bickle?

A No, I do not.

Q Did you discuss that portion of the memorandum with Mr. Long after January 29, 1974?

A Obviously, Mr. Long was aware that we mailed a draft amendment that we expected to be signed.

Q That is your interpretation of Mr. Long's conduct or language in that memorandum?

A Right.

Q I take it that is an inference which you draw. You didn't state that upon knowledge.

A That is my impression.

Q But you don't know that to be the fact?

A No.

Q Was it your intention in sending Plaintiff's Exhibit 9 to Mr. Clements on August 1, 1974 to terminate the contract then in existence between Restaurant Associates and Anheuser-Busch?

MR. KHEEL: If there was any in existence.

MR. SCHAEFFER: That's correct.

A I was under the understanding that there was no signed contract then in existence. So, obviously, I did not consider this letter as terminating a signed contract.

Q Can you tell me why you sent that letter, Plaintiff's Exhibit 9, by registered mail?

MR. KHEEL: I will let the witness answer, but you have gone into a lot of this earlier.

MR. SCHAEFFER: I happen to disagree with you, but I can assure you that I am not trying to confuse the witness. I just want an explanation.

Q The question is: Why did you send this letter

to Mr. Clements by registered mail, return receipt requested?

A I wanted to be sure he received it.

Q Had you in your correspondence with Mr. Clements in the past--did you have correspondence with Mr. Clements in the past?

A Certainly.

Q Had you ever sent a letter to him registered mail return receipt requested?

A Not that I recall.

Q Your testimony is that the reason you sent Plaintiff's Exhibit 9 by registered mail, return receipt requested, is because you wanted to make sure that he received it?

A Right.

Q Why were you more concerned about Mr. Clements receiving that letter, Plaintiff's Exhibit 9, than other correspondence which you had sent to Mr. Clements by ordinary mail, prior to August 1, 1974?

A I was quite frustrated because RA had refused to sign our proposed draft agreement. I was giving official notification that we were going to sit down and try again.

Q Had you, in fact, sat down on July 25, 1974

with Mr. Clements, with Mr. Tolve, with Mr. Thurman, Mr. Sherman and Mr. Fincher in Tampa, Florida?

A Yes.

Q That was prior to the time that you sent Plaintiff's Exhibit 9?

A Yes.

Q Was there a discussion at that time of certain terms and conditions of a new proposed contract between Anheuser-Busch and Restaurant Associates?

A Yes.

Q Had Mr. Tolve told you, Mr. Tolve and Mr. Clements, told you the conditions that they requested for that contract?

A Generally, yes.

Q Had you told them the conditions which generally Anheuser-Busch was willing to go along with?

A Yes.

Q So that that colloquy, that discussion or negotiation had already been set in ~~action~~ motion by virtue of your meeting of July 25, 1974; isn't that correct?

A Yes.

Q With that in mind, I would ask you what the purpose of your August 1st letter to Mr. Clements was?

A It was a formal acknowledgement of the July

meeting and put Mr. Clements on formal notice that we were going to attempt to draft a new document.

Q Mr. Bickle, is there any mention in that Plaintiff's Exhibit 9 of the July 25th meeting?

A No.

Q Isn't it a fact that when you drafted the August 1, 1974 letter to Mr. Clements, Plaintiff's Exhibit 9, that it was your understanding that there was a contract between Restaurant Associates and Anheuser-Busch which was set to expire on November 4, 1974, subject to an automatic renewal clause in the event Anheuser-Busch did not give notice of termination?

A No.

Q Is it your testimony then, sir, that as of August 1, 1974 there was no agreement between Restaurant Associates and Anheuser-Busch extending through November 4, 1974?

A There was an informal understanding in regard to the operation of the fast food facilities.

Q Was there also an informal understanding as respects the operation of the Old Swiss House?

A As I stated before, I didn't understand the exact legal situation between Anheuser-Busch and RA at that time.

Q Was it this informal understanding that you referred to, the understanding that had been concurred in by Mr. Long, as referred to in your memorandum of December 17, 1973, Plaintiff's Exhibit 25, to Mr. Long?

A Yes.

MR. SCHAEFFER: Would you mark this as Plaintiff's Exhibit 28 for identification, a memo, interoffice correspondence dated September 24, 1974, confidential to Mr. James R. Bickle from Dennis P. Long.

(Interoffice memorandum dated September 24, 1974 to Mr. Bickle from Dennis Long marked Plaintiff's Exhibit 28 for identification, as of this date.)

BY MR. SCHAEFFER:

Q Mr. Bickle, did you receive the original of this memorandum, Plaintiff's Exhibit 28 for identification, from Mr. Long on or about Setpember 26, 1974?

A Yes.

Q I refer your attention to Roman numeral VII on page 2 of that memorandum, which states:

"Finally...tell R.A. we want a signed contract - ON TIME."

Did you read that entry of the memorandum on or

about September 26, 1974?

A Yes.

Q Did you discuss that portion of the memorandum with Mr. Long at or about September 26, 1974?

A I don't recall that.

Q Can you tell me what your interpretation, if you have any, of Mr. Long's entry in paragraph Roman numeral VII meant?

MR. KHEEL: Now you want him to speculate what Mr. Long meant, whereas earlier you didn't?

MR. SCHAEFFER: I withdraw the question.

Q Do you know what Mr. Long meant in connection with the entry, Roman numeral VII, on page 2 of Plaintiff's Exhibit 28?

A I assume that Mr. Long meant--

Q First, let me ask do you know?

A I don't know what Mr. Long meant.

Q We will ask Mr. Long.

MR. SCHAEFFER: I would like to mark as Plaintiff's Exhibit 29 for identification an interoffice correspondence, confidential, from Dennis P. Long to James R. Bickle dated October 30, 1974.

(Confidential interoffice correspondence from Dennis P. Long to James R. Bickle

dated October 30, 1974 marked Plaintiff's Exhibit 29 for identification, as of this date.)

BY MR. SCHAEFFER:

Q Mr. Bickle, I show you Plaintiff's Exhibit 29 for identification.

Is that a copy of an interoffice correspondence which you received from Mr. Long on or about October 30, 1974?

A Yes.

Q I call your attention to Roman numeral II on page 2 of that memorandum, Signed Contract:

"Contract with R.A. expires this week. Has Tolve returned our contract?"

Did you read that on or about October 30, 1974?

A Yes.

Q Did you have a discussion with Mr. Long about that entry on this memorandum on or about October 30, 1974 or the weeks that followed?

A Yes.

Q Can you tell me who else was present during that discussion?

A No, I can't.

Q Was there anyone else present?

A Not that I recall.

Q Can you tell me what you said to Mr. Long and what he said to you?

A In relation to this part of the memo, I said that R.A. had never signed and returned our proposed draft amendment contract for 1974.

Q What, if anything, did Mr. Long say to you?

A I don't recall specifically what he said at that point.

Q Did he tell you that he had been under the impression that R.A. had sent back the draft agreement which had been sent to them on January 28, 1974?

A No.

Q But you were under the impression that Mr. Long, when he wrote Plaintiff's Exhibit 29 for identification, was assuming that R.A. had signed and returned the draft agreement submitted to them on or about January 28, 1974?

A No.

Q You were not under that impression?

A No.

Q I thought that was your testimony?

MR. KHEEL: I didn't.

A My testimony was that he didn't know.

Q He didn't know whether or not R.A. had sent back Defendant's Exhibit B marked at the hearing?

A That is what he is asking here.

Q I am sorry.

A That is what he asks in this last sentence of the memo.

Q How about in the first sentence of Roman II, as I understand it:

"The contract with R.A. expires this week"?

A The expiration date of the draft amendment as sent to Restaurant Associates was November 4th.

Q 1974?

A Yes.

Q I show you that draft amendment, Defendant's Exhibit B, and ask whether or not that draft amendment provides for the automatic renewal of the agreement unless notice of termination was given in accordance with the provisions of the 1972 agreement?

A My answer is I don't know.

MR. SCHAEFFER: Counsel, will you so stipulate to that?

MR. KHEEL: I don't think I can. I think I can say that the two written agreements, the two

drafts, the signed agreement, Exhibit 5 and that agreement when read together, had the second one been signed, would have created a legal conclusion and my personal opinion from the top of my head is that your ~~instruction~~ conclusion is probably correct, but whether I will stipulate to that, I am not so sure I can.

MR. SCHAEFFER: Would you mark this, please, as Plaintiff's Exhibit 30 for identification, a handwritten memorandum from the desk of James R. Bickle dated December 2nd, and it indicates that it was received December 2, 1974 in the office of Dennis P. Long.

(Handwritten memorandum from James R. Bickle dated December 2, 1974 to Mr. Long marked Plaintiff's Exhibit 30 for identification, as of this date.)

BY MR. SCHAEFFER:

Q Mr. Bickle, I show you Plaintiff's Exhibit 30 for identification and ask whether or not you caused that handwritten memorandum to be sent to Bill T. and to Denny L.

A Yes.

Q Is Bill T. Bill Thurman?

A Yes.

Q And Denny L. is Dennis Long?

A Yes.

Q The note says:

"Please note attached rough draft showing contract changes made by R.A."

Do you have a copy of the rough draft showing those contract changes that was attached to this memorandum?

A I believe Mr. Kheel does.

MR. SCHAEFFER: Do you have that with you today?

MR. KHEEL: No.

MR. SCHAEFFER: This is a document, Plaintiff's Exhibit 30 for identification, a document which I received from you.

MR. KHEEL: I had heard earlier during Mr. Bickle's deposition of a red line draft. I have seen it. I believe I have a photocopy of it in our files. If not, the original is in St. Louis and we can readily find it for you tomorrow.

MR. SCHAEFFER: Fine.

MR. KHEEL: That is to my knowledge the same document to which reference is made earlier.

MR. SCHAEFFER: So we can see it tomorrow,

then, in St. Louis.

(Whereupon, at 1:00 p.m., a recess was taken for the purpose of luncheon.)

AFTERNOON SESSION

1:40 p.m.

J A M E S B I C K L E, still under oath, testified further as follows:

EXAMINATION (Contd.)

BY MR. SCHAEFFER:

Q Mr. Bickle, with respect to the letter of September 24, 1973, Defendant's Exhibit A, marked at the hearing, did you or to your knowledge did any other representative, employee of Anheuser-Busch inform the Florida State Beverage Department that the contract with Restaurant Associates had been terminated?

A I did not and to my knowledge no one else did.

Q Are you aware of any filings that were made with the Florida State Beverage Department as respects the Old Swiss House between September of 1973 and June of 1975?

A No.

Q Can you tell me who within Anheuser-Busch,

which employee or officer or director would be responsible for filing applications and making any required submissions to the Florida State Beverage Department as respects the Old Swiss House on behalf of Anheuser-Busch?

A Normally, that would be done by our legal department.

Q You, yourself, did not receive any memoranda or any copies of letters or correspondence that were sent from any employee of Anheuser-Busch to the Florida State Beverage Department?

MR. KHEEL: Is this any communication or relating--

MR. SCHAEFFER: Relating to the Old Swiss House between September of 1973 and June of 1975.

MR. KHEEL: Any communication?

MR. SCHAEFFER: Any communication whatsoever.

A I am sure there probably was some communication to the Florida ABC. I don't recall specifically.

Q Do you remember seeing a particular communication, one or more particular communications, relating to the Old Swiss House between September of 1973 and June of 1975?

A No, I don't remember.

Q Would those records be kept in the executive offices of Anheuser-Busch in St. Louis, Missouri?

A I would assume copies of any communications to the Florida ABC would be in the executive offices, yes.

MR. SCHAEFFER: Mr. Kheel, I assume you don't have any communications of that nature with you today.

MR. KHEEL: No, I do not. I have a vague recollection of having seen at least one. I do not know the time period and I may be totally wrong in my recollection.

In any event, I don't believe you called for the production of that kind of document.

MR. SCHAEFFER: Tomorrow we will be in St. Louis with respect to Mr. Long. If you have no objection, I would like to review that, assuming that they are in St. Louis.

MR. KHEEL: I will call Mike Carpenter ~~Carpentar~~ to ascertain whether there is a file with respect to the Florida Beverage Department and if, in fact, there is a file and, if it is in St. Louis, in fact, we will make it available to you tomorrow, unless for some reason they wish to claim some sort of privilege that I can't conceive of.

MR. SHCAEFFER: I would like to mark as Plaintiff's Exhibit 31 for identification a one-page interoffice correspondence dated January 27, 1975 on the letterhead of Anheuser-Busch, Inc., noted confidential, to Mr. Dennis P. Long and to Mr. William H. Thurman.

(One-page interoffice correspondence dated January 27, 1975, confidential, to Mr. Long and Mr. Thurman marked Plaintiff's Exhibit 31 for identification, as of this date.)

BY MR. SCHAEFFER:

Q Mr. Bickle, are you aware of whether or not the management committee of Anheuser-Busch considered on its agenda prior to September 24, 1973 the question of either continuing the contract, Plaintiff's Exhibit 5, or terminating the contract, Plaintiff's Exhibit 5?

A No, I am not.

Q Do you know whether or not it ever appeared on the agenda of the management committee prior to September 24, 1973?

A No, I do not.

Q I show you Plaintiff's Exhibit 31 for identification, a memorandum or an interoffice correspondence dated January 27, 1975, marked confidential, to Mr. Long

and Mr. Thurman and ask if you wrote the text of that memorandum.

A Yes.

Q I note that that memorandum does not--I note that the memorandum is a one-page memorandum which was given to me during the course of document discovery by your lawyer.

I note that it does not carry your name at the bottom, nor your initials or signature.

Was there another page in this memorandum?

A I believe the second page contained only my name and signature.

Q And it didn't contain any substantive statements?

A That is my recollection.

MR. SCHAEFFER: If I might ask, upon your return to St. Louis, I know that you are now making a trip, you have told us to Germany, but on your return to St. Louis, if you would check your files to see whether you can locate this additional page or pages of that memorandum and, if so, supply them to your lawyer, and if they are not privileged in one way or the other, that he will supply that to me.

Is that acceptable, Mr. Kheel?

MR. KHEEL: If he supplies me with anything, I will be more than glad to forward it to you, except for privilege.

BY MR. SCHAEFFER:

Q When, Mr. Bickle, did you have your first conversation with a member of the legal department of Anheuser-Busch relative to what your legal position was with regard to the operating contract with Restaurant Associates?

MR. KHEEL: When you say your position, you mean Anheuser-Busch's position?

MR. SCHAEFFER: Anheuser-Busch's position.

Q With specific reference to your memorandum of January 27, 1975.

A I would say the latter part of 1974.

Q With whom did you speak?

A Normally, I spoke with Mr. Carpenter ~~Carpentar.~~

Q Is that Michael Carpenter ~~Carpentar?~~

A Yes.

Q Is he on the staff, the legal staff of Anheuser-Busch?

A Yes.

MR. SCHAEFFER: I ask that this handwritten

memorandum carrying the slogan, "When you say Budweiser, you've said it all," dated November 14, 1974 to Jim B. on the stationery from the desk of Dennis P. Long, be marked as Plaintiff's Exhibit 32 for identification.

(Handwritten memorandum dated November 14, 1974 to Jim B. from the desk of Dennis P. Long marked Plaintiff's Exhibit 32 for identification, as of this date.)

BY MR. SCHAEFFER:

Q Mr. Bickle, I show you Plaintiff's Exhibit 32 for identification and ask if you have seen the original of that document.

A Yes.

Q Is that the handwriting of Mr. Long?

A Yes.

Q You are familiar with that handwriting?

A Yes.

Q In the first sentence, the memorandum says:

"Please let me know each change they have made."

Does that refer to the contract which Miss Bernstein sent to you on or about November 7, 1974?

A Yes.

Q Does that refer to a comparison of the language and provisions employed in Plaintiff's Exhibit 6 and 7, respectively?

A Yes.

Q The second sentence of Mr. Long's memorandum, Plaintiff's Exhibit 32, says:

"Does this give us an opportunity to change the 'maintenance' area?"

Is that correct?

A Yes.

Q Did you have a discussion with Mr. Long as to what he meant by the second sentence of that memorandum?

A I think there was some discussion.

Q Can you tell me what it is he said to you and what it is you said to him?

A Mr. Long was aware that maintenance had been a continuing source of dispute and he was hoping that, if we were able to reach a new agreement, we could eliminate the conflict in regard to maintenance.

Q What provisions prevailed as to maintenance and the arrangements for maintenance at the Old Swiss House between Restaurant Associates and Anheuser-Busch as of the date of Plaintiff's Exhibit 32 for identification had been prepared?

A The relative responsibilities for maintenance were in a very confused state, I would say, at that point.

Q Was there any writing which governed who had the respective responsibility for degrees of maintenance at the Old Swiss House as of the date of that memorandum?

A There was a maintenance provision in the draft amendment sent January of 1974, but since that was never signed, we were unsure as to what governed the maintenance responsibilities.

(A short recess was taken.)

BY MR. SCHAEFFER:

Q Mr. Bickle, would you identify Sidney Sherman?

A Sidney Sherman is currently the operator of the Old Swiss House under contractual agreement with Anheuser-Busch.

Q When was it that you first met Mr. Sherman?

A The early part of 1974.

Q At that time what was Mr. Sherman's position?

A He was working with Mr. Anderson in managing the Old Swiss House.

Q Did there come a time early in 1974 that he took over on behalf of Restaurant Associates exclusively the management of the Old Swiss House?

A Yes.

Q Mr. Anderson left?

A Yes.

Q Was Mr. Sherman an employee of Restaurant Associates at the time that you met him?

A Yes.

Q From the time that Mr. Anderson left the Old Swiss House in early 1974, was Mr. Sherman charged with the responsibility of running the Old Swiss House for Restaurant Associates?

A Yes.

Q Did there come a time that you, on behalf of Anheuser-Busch, offered employment to Mr. Sherman?

A Yes.

Q Can you tell me when that was?

A February 1975.

Q At the time that you offered employment to Mr. Sherman in February 1975, was he still an employee of Restaurant Associates?

A Yes.

Q Was Restaurant Associates still managing the Old Swiss House?

A Yes.

Q Do you recall the date upon which you spoke or

wrote to Mr. Sherman offering him employment in February of 1975?

A I believe it was about February 9th.

Q Did you go down to Tampa?

A Yes.

Q Were you alone?

A No.

Q Who were you with?

A Mr. Collins, our financial analyst.

Q His first name?

A Don.

Q Does he work for Anheuser-Busch?

A Yes.

Q Prior to going to Tampa to speak with Mr. Sherman on or about February 9, 1975, had you been in touch with Mr. Sherman to tell him that you were coming down?

A Yes.

Q Had you told him that you were going to be making a proposal to him with respect to the management of the Old Swiss House on behalf of Anheuser-Busch?

A I don't recall that I told him we were going to make a proposal. It's possible I did.

Q Was that a telephone conversation that you had

with him?

A Yes.

Q Prior to February 9, 1975, had you discussed with Mr. Sherman the possibility of his coming to work for Anheuser-Busch, running the Old Swiss House for Anheuser-Busch?

A Not that I recall. There had been some discussion. We wanted to make sure that Mr. Sherman did not leave the Old Swiss House.

Q You mean when the Old Swiss House was being managed by Restaurant Associates?

A Yes.

We had an interim manager. We had a lot of problems with Mr. Madore.

Q Was he an employee of Restaurant Associates?

A Yes.

Q When was Mr. Madore employed as manager of the Old Swiss House, as best as you recall?

A 1972, I guess.

Q Did you inform Mr. Sherman either on February 9, 1975 or before that date that the agreement that had been proposed by Restaurant Associates, Plaintiff's Exhibit 7, was unacceptable to Busch?

A Yes.

Q You told Mr. Sherman that Plaintiff's Exhibit 7 was not acceptable to Anheuser-Busch?

A I don't know that I said it in those specific terms. I related that there had been no agreement.

Q When did you tell that to Mr. Sherman?

A I would say, as I recall, late January or early February, 1974.

Q Your communications--

A 1975, excuse me.

Q Your communications with Mr. Sherman prior to February 9, 1975, I take it, were telephonic communications?

A Yes.

MR. KHEEL: For clarity, you mean with respect to this subject, because he had met him on other occasions before.

MR. SCHAEFFER: Withdraw the question.

Q With respect to the offer of employment which Anheuser-Busch was making to Sidney Sherman, is it correct that your communications with Mr. Sherman prior to February 9, 1975 were telephonic communications?

A Yes.

Q You did not have any meetings or conferences with Mr. Sherman to discuss ~~respective~~ prospective employment of him

by Anheuser-Busch prior to February 9, 1975; is that correct?

A I had occasion to be in Tampa quite often. I might have had occasion to discuss this with Mr. Sherman prior to February 9th in person.

Q Did you prepare any memorandum with respect to the discussions you had with Sidney Sherman relative to his employment by Anheuser-Busch as manager of the Old Swiss House?

A Yes.

Q Do you have those memoranda here with you?

A No.

Q Do you know the dates of those memoranda?

A I believe immediately--I believe one memorandum is the one which you submitted to me earlier without the second page.

Q Plaintiff's Exhibit 31?

A Right.

Q The one-page memorandum?

A Right.

Q It doesn't have the signature page.

Were there any other memoranda that you prepared in connection with your discussions and negotiations with Mr. Sherman relative to his employment by Anheuser-

Busch?

A I don't recall any specific memorandums.

MR. SCHAEFFER: Why don't we mark this. It is Plaintiff's Exhibit 33 for identification. It is interoffice correspondence of Anheuser-Busch from Mr. Bickle to Mr. Long and Mr. Thurman dated April 23, 1975.

(Interoffice correspondence from Mr. Bickle to Mr. Long and Mr. Thurman dated April 23, 1975 marked Plaintiff's Exhibit 33 for identification, as of this date.)

BY MR. SCHAEFFER:

Q I show you Plaintiff's Exhibit 33 for identification.

Is that a memorandum which you prepared and sent to Mr. Thurman and to Mr. Long?

A Yes.

Q Can you tell me whether or not you prepared a memorandum in connection with the meeting between yourself, Mr. Collins and Mr. Sherman on February 9, 1975?

A I don't recall.

Q If there is such a memorandum, I, during the course of document discovery--your lawyer has made certain documents available to me--I did not note a document of

that nature. In the event you should find such a memorandum relating to that meeting, would you submit it to Mr. Kheel and, subject to his approval, a copy will be sent to me?

A Certainly.

Q Can you describe to me the discussions that you had with Mr. Sherman prior to February 9, 1975? Tell me what you said to him and what he said to you.

A In general, our discussions were to the extent that so far Restaurant Associates had not opted to sign our offer contract on the terms and conditions that we had proposed and that if we could not come to an agreement with Restaurant Associates, then we would have to make arrangements for a successor.

Q Let me interrupt you at that point.

Are you referring to Plaintiff's Exhibit 6 when you said the contract that Busch proposed?

A Yes.

Q Was that the extent of the conversation or did you--what, if anything, did Mr. Sherman say to you and what, if anything, additional, did you say to him?

A Mr. Thurman--

Q Sherman.

A Sherman expressed the hope on his part that we

could come to an agreement with R.A. and continue to operate with R.A. as the agent and he as their employee.

Q To the best of your recollection, when did that conversation take place, Mr. Bickle?

A The end of 1974 or the first of 1975, somewhere in that period.

Q Did that conversation take place prior to your preparation of Plaintifff's Exhibit 31?

A Yes, I would say it did.

Q Between the time of the conversation that you just testified to and January 27, 1975, the date Plaintiff's Exhibit 31 was prepared, did you have any other conversation with Mr. Sherman?

MR. KHEEL: For the record, you mean any conversation or more specific?

MR. SCHAEFFER: Any conversation with Mr. Sherman.

A I had several conversations with Mr. Sherman during that period. I can't recall specific conversations.

Q Did you have any conversation between that period prior to January 27, 1975 with Mr. Sherman relative to the management of the Old Swiss House?

A Prior to January 27th?

Q Yes.

A I believe we did have a telephone discussion whereby I indicated if R.A. and Anheuser-Busch could not reach an agreement, that we had to make arrangments for a successor.

Q Did Mr. Sherman say anything about that?

A He indicated that he would be interested to be considered.

Q Did he tell you the terms and conditions ~~of~~ upon which he would be interested in entering into such an arrangement?

A Not specifically on the telephone, no.

Q I show you Plaintiff's Exhibit 31 for identification and direct your attention to the paragraph appearing virtually in the middle of the page.

"In regard to the type of arrangement,

1) Sid wants very much to have some sort of a profit-sharing type of agreement which would enable him to make at least as much as his current salary amounts to, with the potential of further improving remuneration as the performance of the Old Swiss House improves."

Did Mr. Sherman tell that to you during the course of a telephone conversation prior to January 27, 1975?

A Yes.

Q After having written this memo, Plaintiff's Exhibit 31 for identification, did you receive a communication from Dennis Long relative to this memo?

A If you are talking about the note written on the memo, yes.

Q In effect, what is it that Mr. Long wrote to you?

A He says:

"O.K. to pursue with Sid. Final proposal to Busch should compare elements of R.A. contract to Sherman's and Sid's financial status."

Q It is signed D.L.?

A Yes.

Q Prior to entering into disucssions with Mr. Sherman in late 1974-early 1975, had you spoken with Mr. Long and told him you were going to enter into such discussions?

A Yes.

Q Did he authorize you to enter into those discussions on behalf of Busch?

A Yes.

Q Do you recall when it was that you spoke with Mr. Long relative to that?

A No, I don't.

Q Do you recall whether there was any written correspondence, interoffice memoranda or otherwise, either from Long to you or from you to Mr. Long, prior to January 27, 1975 relative to the authorization to make an offer to Mr. Sherman?

A No, I don't.

Q You don't recall if there was any such memoranda?

A Right.

Q I note that the handwritten entry made by Mr. Long on Plaintiff's Exhibit 31 is dated January 29, 1975.

After receiving that note from Mr. Long, what, if anything, did you do?

A I made arrangements with Mr. Sherman to meet with him in Tampa and finalize the elements of the agreement.

Q Was that the purpose of your visit to Tampa with Mr. Collins on February 9th?

A Yes.

Q Other than you, Mr. Collins and Mr. Sherman, was anyone else present during the discussion that was held in Tampa with Mr. Sherman?

A Not that I recall.

Q Can you tell me what it is that Mr. Sherman said to you and what it is you said at that meeting and what, if anything, Mr. Collins said at that meeting?

A We discussed the specific terms and conditions under which Sid would be willing to enter into an agreement and also the logistical problems involved in his forming a corporation and making arrangements to take over the restaurant without interruption.

Q Did Mr. Sherman tell you not to bring your discussions or negotiations to the attention of any other employee or officer or director of Restaurant Associates until you had formalized an agreement with him?

A I don't recall his making that request.

Q Did you, in fact, notify any officer, director or employee of Restaurant Associates of the negotiations that you were having with Mr. Sherman prior to May 27, 1975?

A No.

Q Are you aware of any employee, representative, officer or director of Anheuser-Busch having notified any officer, director or employee of Restaurant Associates, other than Mr. Sherman, of the negotiations between Anheuser-Busch and Sidney Sherman prior to May 27, 1975?

A No.

Q What were the, to the best of your recollection, specific provisions discussed with Mr. Sherman on February 9, 1975 during your meeting at Tampa?

A I can't recall in detail all the specific provisions. I think the contract itself would speak in that regard.

Q You have no specific recollection of the provisions that were discussed?

A Obviously, we discussed his remuneration, what type of incentive would be included, the term of the contract and, in general, items of that nature.

Q When you left Tampa on February 9, 1975, had you reached, in your mind, a meeting of the minds with Mr. Sherman as respects the terms and conditions of a contract for him to operate the Old Swiss House on behalf of Anheuser-Busch?

A No.

Q What were the matters of disagreement between you and Mr. Sherman at the end of the meeting on February 9, 1975?

A Mr. Sherman's proposal to us contained a larger guaranteed salary figure than we had initially proposed to him and I had to get approval for that larger amount from Mr. Long.

Q Do you recall what the salary figure was he was requesting?

A $40,000, I believe.

Q Do you recall what you had been authorized to offer him?

A Our preliminary offer was for $20,000.

Q Were there any other differences as respects theoffer which you made to Mr. Sherman and the terms and conditions which he required as respects the employment agreement?

A There were some further discussions as to the incentive percentage to be paid Mr. Sherman.

Q Were there any other differences, Mr. Bickle, that you can recall?

A I don't recall any other major differences.

Q Did you return directly from Tampa to St. Louis after meeting with Mr. Sherman?

A Yes.

Q Did you report back to Mr. Long?

A Yes.

Q I think you have already testified you don't recall whether or not you prepared a memorandum?

A Right.

Q Did you thereafter speak with Mr. Sherman again

relative to his employment by Anheuser-Busch?

A Yes.

Q Do you recall when it was that you next spoke with him?

A No, I don't.

Q Did you have occasion to go down to Tampa again to meet with him after February 9, 1975?

A I don't recall meeting with him in person again before May of 1975.

Q So that between February 9, 1975 and May of 1975, you have no specific recollection of having met with Sidney Sherman in person?

A Right.

Q Were there telephone calls during that period of time?

A Yes.

Q By the time you saw Mr. Sherman again, I take it it was in Tampa, by the way?

A Yes.

Q Had there been a meeting of the minds between Anheuser-Busch and Sidney Sherman as respects the terms and conditions of the agreement between those two parties?

A Yes.

Q When was it that you next saw Mr. Sherman in

person?

MR. KHEEL: Is this after the meeting of the minds?

MR. SCHAEFFER: No, this is after February 9th.

Q When was it that you next saw Mr. Sherman in person after February 9, 1975?

A As I recall, it was in May when Mr. Carpentar and I met with Mr. Sherman.

Q Mr. Carpentar is an attorney on the staff of Anheuser-Busch?

A Yes.

Q Do you recall the date that you and Mr. Carpenter ~~tar~~ went to Tampa to see Mr. Sherman?

A No.

Q Was it in early May?

A I believe it was.

Q Can you tell me what the purpose of your visit was?

A To finalize an agreement with Mr. Sherman.

Q Did you bring an agreement down with you, a written agreement down with you to Tampa?

A No.

Q What terms and conditions were still to be dis-

cussed at that meeting in May with Mr. Carpentar and with Mr. Sherman?

A In general, we had agreed with Mr. Sherman on the terms and conditions. The purpose of that meeting was to put them in final form and to draft a contract to give to Mr. Sherman.

Q Can you tell me what it was that you said, what it was that Mr. Sherman said and what it was that Mr. Carpentar said at that meeting in May of 1975?

A In general, we informed Mr. Sherman that we would accept his proposal to us regarding his monetary requirements for the operation and we went over again in some detail the technical problems that would be involved in effecting the take-over in regards to his setting up a corporation, payroll system, etc.

Q Did Mr. Sherman tell you on that occasion that he had or had not notified Restaurant Associates in connection with your negotiations?

A Not that I recall.

Q Did he specifically request that Restaurant Associates not be notified by Anheuser-Busch until after an agreement had been finalized between Anheuser-Busch and Sidney Sherman?

A He requested that he be given the opportunity

to give R.A. advance notification.

Q During your discussions with Mr. Sherman, had you asked him whether or not he had a written employment contract with Restaurant Associates?

MR. KHEEL: This is at any time?

MR. SCHAEFFER: Yes.

A I don't recall specifically. I would assume that the point was raised.

Q You don't recall whether or not you asked him?

A No.

Q As of April 23, 1975, Mr. Bickle, were you aware that Restaurant Associates had not signed Defendant's Exhibit B?

A Yes.

Q Were you also aware that Restaurant Associates had not signed Plaintiff's Exhibit 6?

A Yes.

Q You state, do you not, in your memorandum dated April 23, 1975, Plaintiff's Exhibit 33 for identification, that paragraph 2 on page 3:

"There is a slight possibility that Restaurant Associates may, upon receiving the notice of cancellation, decide to instigate some court action against either Busch or Sid Sherman, in

effect charging that Busch had conspired with Sherman in an effort to induce him to break his employment contract with Restaurant Associates. (The employment contract is implied, but not written. Sherman has never had a written employment contract with Restaurant Associates.)

"In the event they did this and were successful, they might be expected to win damages equal to their anticipated profits for the Old Swiss House under Sherman's management for the balance of the 1974 term, which ends November 4, 1975."

Mr. Bickle, in writing that memorandum, did you not state that the Restaurant Associates term ends November 4, 1975?

MR. KHEEL: I believe it doesn't say that. It says what it says. You can read it back, if you like, Mr. Schaeffer. I don't see the words Restaurant Associates--Restaurant Associates in reference to the specific words you read.

MR. SCHAEFFER: In the event we were to use the words Restaurant Associates wherever the word they was used in that second paragraph, the paragraph would read:

"In the event Restaurant Associates did this and were successful, Restaurant Associates might be expected to win damages equal to Restaurant Associates' anticipated profits from the Old Swiss House under Sherman's management for the balance of the 1974 term, which ends November 4, 1975."

BY MR. SCHAEFFER:

Q Was it your impression, Mr. Bickle, at the time you drafted that memo, Plaintiff's Exhibit 33 for identification, that there was a contract in existence between Restaurant Associates and Anheuser-Busch which was to expire on November 5, 1975?

A No.

Q It was not?

A No.

MR. SCHAEFFER: Would you mark this as Plaintiff's Exhibit 34 for identification. It is an interoffice correspondence from Mr. Long to Mr. Busch, III, dated April 25, 1975.

(Interoffice correspondence from Mr. Long to Mr. Busch, III dated April 25, 1975 marked Plaintiff's Exhibit 34 for identification, as of this date.)

BY MR. SCHAEFFER:

Q I show you Plaintiff's Exhibit 34 for identification and ask if you received a copy of that interoffice memorandum on or about April 25, 1975.

A Yes.

Q Going back to September of 1973, prior to September 24 of 1973, did you ever receive a memorandum from Mr. Long pursuant to which he recommended the termination of Restaurant Associates at the Old Swiss House?

A Prior to 1973--

Q Prior to September 24, 1973.

A I don't recall.

MR. SCHAEFFER: Would you mark as Plaintiff's Exhibit 35 for identification a letter dated May 13, 1975 addressed to "Dear Jim," signed "Sincerely, Sid" in handwriting, with an attachment which is an agreement unsigned but between Anheuser-Busch, Inc. and Sherman Management Corporation, of 13 pages in length.

(Thirteen-page document dated May 13, 1975 to Mr. Bickle from Mr. Sherman marked Plaintiff's Exhibit 35 for identification, as of this date.)

BY MR. SCHAEFFER:

Q Mr. Bickle, I show you Plaintiff's Exhibit 35

for identification and ask whether or not you received that letter together with the attachment from Mr. Sherman on or about May 13, 1975?

MR. KHEEL: The original of this?

Q The original of that letter from Mr. Sherman on or about May 13, 1975?

A Yes.

Q Are you aware of who informed Restaurant Associates that Mr. Sherman had entered into an agreement with you--with Anheuser-Busch, whether it was a representative of Anheuser-Busch or whether it was Mr. Sherman?

MR. KHEEL: Both could have done it.

Do you mean who first did it?

Q Who first advised Restaurant Associates?

A Mr. Sherman requested that he have the first opportunity to do that. Whether he specifically told Restaurant Associates about the offer of employment, I don't know.

Q Mr. Bickle, are you, as part of your responsibilities with Anheuser-Busch, aware of--

MR. SCHAEFFER: Withdraw that question.

Q Are you, as part of your responsibilities as an employee of Anheuser-Busch, kept informed as to the

gross sales of the Old Swiss House on a monthly basis?

A Not any longer. I no longer have responsibilities for food and beverage operations.

Q Your new responsibilities are purely for merchandising?

A Yes.

Q So that you do not have any personal knowledge of the profit and loss statement or the balance sheets for the Old Swiss House for the period commencing July 10, 1975 through December 26, 1975?

A I have access to that information.

Q Do you have any of that information available with you today?

A No.

Q Would Mr. Roger Bates be the individual charged with responsibility on a day-to-day basis for that type of information?

A Yes.

(A short recess was taken.)

BY MR. SCHAEFFER:

Q I show you, Mr. Bickle, Plaintiff's Exhibit 10 for identification, a letter dated--

MR. KHEEL: This was marked at the hearing?

MR. SCHAEFFER: Plaintiff's Exhibit 10 for identification previously marked at the hearing on the preliminary injunction.

Q Have you seen that letter before?

A Yes.

Q Did you receive a copy of that letter when it was sent--

MR. SCHAEFFER: Withdraw that question.

Q Although that letter indicates that it was sent registered mail, return receipt requested, isn't it a fact that you yourself delivered that letter to Mr. Tolve on May 27, 1975?

A Yes.

Q It was hand-delivered?

A Yes.

Q Did you have occasion prior to May 27, 1975 to review the language of that letter?

MR. KHEEL: Before what date?

MR. SCHAEFFER: Before May 27, 1975, the date he delivered it to Mr. Tolve.

A This letter was drafted by our legal department. I didn't analyze it in any detail.

Q Did you read it?

A Yes.

Q Did you speak with Mr. Long about it before you delivered it to Mr. Tolve?

A Yes.

Q Did you speak with Mr. Long as respects the very first sentence of that letter:

"By letter of August 1, 1975 we notified you of our intent to terminate the subject agreement as to the terms and conditions then in effect."

Did you discuss that language of the letter with Mr. Long?

A No.

Q Do you know whether or not Mr. Long in the first sentence of that letter was referring to the letter you had sent to Mr. Clements, Plaintiff's Exhibit 9?

A I would assume so.

Q But you don't know?

A Since the dates match, I think it's obvious.

Q By the way, are you familiar with Mr. Long's signature?

A Yes.

Q Did he sign the letter I have just shown you?

A Yes.

Q Did you have occasion to discuss with Mr. Long either before or after you delivered that letter to

Mr. Tolve the contents of that letter, more specifically, the contents of the first sentence of that letter?

A Not that I recall.

Q You don't recall having any such conversation with him?

A No.

MR. SCHAEFFER: I have no further questions.

Thank you very much, Mr. Bickle.

(Time noted: 3:05 p.m.)

Subscribed and sworn to before me
this 23rd day of March, 1976.

Notary Public
City of St. Louis, Mo.

My Commission Expires February 28, 1977

DEPOSITION OF DENNIS P. LONG

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RESTAURANT ASSOCIATES INDUSTRIES, INC.,	)	
Plaintiff,	)	
vs.	)	No. 75 Civ. 3018
ANHEUSER-BUSCH, INC.,	)	
Defendant.	)	

Deposition of: DENNIS P. LONG ---------- Page 4
ROGER BATES ---------- Page 70
on behalf of the Plaintiff

GORE REPORTING COMPANY
408 OLIVE STREET
ST. LOUIS, MISSOURI 63102

Deposition of Dennis P. Long

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RESTAURANT ASSOCIATES INDUSTRIES, INC.,	)	
Plaintiff,	)	
vs.	)	No. 75 Civ. 3018
ANHEUSER-BUSCH, INC.,	)	
Defendant.	)	

DEPOSITION OF WITNESSES, on behalf of the Plaintiff, taken to be used in an action pending in the United States District Court, Southern District of New York, wherein Restaurant Associates Industries, Inc. is Plaintiff and Anheuser-Busch, Inc. is Defendant, pursuant to agreement, under the provisions of the Rules of Civil Procedure; taken on the 24th day of February, A. D. 1976, at Anheuser-Busch, Inc., Legal Department, 721 Pestalozzi Street, in the City of St. Louis, State of Missouri, before Vickie L. Huelsman, Registered Professional Reporter, a Notary Public in and for the County of St. Louis, State of Missouri.

The Plaintiff, Restaurant Associates Industries, Inc., appeared by its attorneys, Messrs. Dornbush, Mensch & Mandelstam, by Richard J. Schaeffer, Esq.

The Defendant, Anheuser-Busch, Inc., appeared by its attorneys, Messrs. Wilkie, Farr & Gallagher, by Robert J. Kheel, Esq. and T. Michael Carpenter, Esq.

Also present is Mr. Ralph Tolve.

MR. KHEEL: Mr. Schaeffer, yesterday we marked as Plaintiff's Exhibit 31, a one-page memorandum from Mr. Bickle to Mr. Long dated January 27, 1975. We found a second page bearing the date of January 28th, 1975, which we think is the second page of what was marked Plaintiff's Exhibit 31. I'd like to give you a copy of that second page.

MR. SCHAEFFER: Thank you.

MR. KHEEL: As you know, Mr. Bickle is not out here so we cannot confirm that it is, in fact, the second page. Mr. Schaeffer, you also asked yesterday for correspondence with the Florida A. B. C. Commission, and Mr. Carpenter has given me a letter from himself to that department dated July 10, 1975 and a reply thereto dated July 14, 1975, which I'd like to give you. You indicated also to me that to the extent that the additional correspondence, and in particular to the extent that the Commission apparently requires information to be filed every time there is a change of the individual who is in charge of the operations, as a matter of fact, rather than the legal entity he works for, that some reporting is done. He does not have it here and believes that such records, if they were kept, are kept in Tampa, Florida, and that we're prepared to request copies be prepared for your review, but we cannot tell you when we will have those available.

MR. SCHAEFFER: Let me say that I acknowledge

receipt initially of a copy of a letter dated July 14, 1975 from the State of Florida Department of Business Regulation to Mr. T. Michael Carpenter and a copy of a letter dated July 10th, 1975 from T. Michael Carpenter to the Department of Business Regulation. With respect to the correspondence between the Florida Alcoholic Beverage Control Board and Anheuser-Busch, I do want to say that at the time Restaurant Associates was initially retained to manage a certain area at Busch Gardens in Tampa, Florida, the contract back in 1969 that was executed between Restaurant Associates Industries, Inc. and Anheuser-Busch, Inc. was subject to the approval of the Florida Alcoholic Beverage Control Board. It is our understanding, on an annual basis, reports must be made by Anheuser-Busch, Inc., as by all licensees, to the Florida Alcoholic Beverage Control Board setting forth any changed circumstances, i. e. if, in fact, a management agreement with the agent of a licensee were terminated, we think that is relevant that the Florida Alcoholic Beverage Control Board would find that relevant and would require that that information be given to them. Accordingly, our request for documents for any filings made by Anheuser-Busch, Inc. with the Florida Alcoholic Beverage Control Board between August of 1973 and July 30th of 1975 as respects the Old Swiss House, you've explained, Mr. Kheel, that copies of those records are not available in St. Louis. We would request that you make the

effort to obtain those records from the person who, in fact, has custody of those records.

MR. KHEEL: We will so do

MR. SCHAEFFER: I just want to state that the deposition, which is being held today, is being held pursuant to stipulation under Rule 29 of the Federal Rules of Civil Procedure. The deposition is being taken by the plaintiff of Anheuser-Busch, Inc., the defendant by Dennis Long, Vice President. It is the intention of the plaintiff to offer either a portion of, portions of, or the entire transcript in evidence at the trial of this matter pursuant to Rule 32 of the Federal Rules of Civil Procedure.

DENNIS P. LONG,

of lawful age, having been first duly sworn to testify the truth, the whole truth and nothing but the truth in the case aforesaid, deposes and says in reply to oral interrogatories propounded as follows, to-wit:

DIRECT EXAMINATION

QUESTIONS BY MR. SCHAEFFER:

Q Mr. Long, would you state your name and a residence address, please? A Dennis P., as in Patrick, Long. 9139 Rusticwood Trails, St. Louis, 63126.

Q Mr. Long, you are presently employed by Anheuser-Busch, Inc.? A Yes.

Q And in what position? A I'm a Vice

President and Group Executive.

Q And over what divisions do you function as a Vice President and Group Executive? What divisions of Anheuser-Busch?

A The Industrial Products Division, Busch Properties, Incorporated, which is not a division but a subsidiary, and Busch Gardens.

Q And is the Busch Gardens Division charged with the responsibility for the management and operation of Busch Gardens in Tampa, Florida, as well as Busch Gardens in Williamsburg, Virginia, as well as Busch Gardens in Los Angeles, California?

A Yes, and others.

Q There are other Busch Gardens?

A Other locations with which they are involved.

Q I'd like you to go back now to September -- to January 1st of 1973 and briefly tell me what your position with Anheuser-Busch was as of January 1st, 1973 and any changes that have taken place since January 1st, 1973.

A The same title. I did not at that time, though, have Busch Properties, Incorporated. Busch Properties was added at a later date.

Q You were, as of January 1st, 1973, ~~in charge~~ charged with the responsibility for the over-all management and operation of Busch Gardens in Tampa, Florida?

A That's right.

Q Mr. Long, I show you Plaintiff's Exhibit 5, a document which was previously marked during the course of the Preliminary Hearing before the Honorable Milton Pollack on July 8th, 1975, which is a -- the original of an Agreement dated December 8th, 1972 between Anheuser-Busch, Incorporated and Restaurant Associates Industries, Inc., and I'd ask if you executed that document on behalf of Anheuser-Busch, Inc.?

A Yes.

Q Prior to executing that document, Mr. Long, did you read it thoroughly? A I assume I did.

Q And did you make yourself familiar with the provisions of the Agreement prior to signing the Agreement?

A I assume I did.

Q And as of December 8th, 1972, the date which appears on this Agreement, were you charged with responsibility, among others, for the over-all operation and management of the Busch Gardens located in Tampa, Florida?

A Yes.

Q Do you recall the date upon which you signed Plaintiff's Exhibit 5? A No, I don't.

Q Do you have any memoranda or document present with you which would refresh your recollection as to the date upon which you signed this document?

A I don't.

MR. KHEEL: Off the record.

(Discussion off the record)

MR. SCHAEFFER: Mr. Long, I'd ask you to look at Plaintiff's Exhibit 5 and tell me what the expiration date of that Agreement was, not taking into regard the automatic renewal clause; that is to say had the Agreement been terminated and not permitted to continue, when would the Agreement have terminated by its terms? Do you understand the question?

A No. Say it again.

Q I'll withdraw that question.

A You asked me now --

Q Without respect to paragraph 4B of Plaintiff's Exhibit 5, can you tell me what the expiration date of that Agreement is?

A I can tell you what's here on page seven under 4A. Is that what you're asking me?

Q I gave you my copy. Off the record.

(Discussion off the record)

MR. SCHAEFFER: Read back the question, please.

(Whereupon the reporter read the record as directed)

THE WITNESS: I'm going to read 4A: "Initial term of Associates appointment of manager of the areas furnished shall commence, ~~and~~ on the commencement date and shall terminate two years thereafter."

MR. SCHAEFFER: Was the commencement date December 26th, 1971?

A Under definitions I-A: "Commencement date shall be the 26th day of December, 1971."

Q So that pursuant to 4A, paragraph 4A of Plaintiff's Exhibit 5, the termination date ~~will~~ would be December 26th, 1973, is that correct?

A I think that's what the contract says.

Q Well, going back to August of 1973, Mr. Long, were you familiar with the terms of Plaintiff's Exhibit 5?

A I honestly can't answer. I must assume I was. I can't answer.

Q In August of 1973, and prior to August of 1973, was Anheuser-Busch contemplating the construction of a hotel or a motel adjacent to the Old Swiss House at Busch Gardens in Tampa, Florida?

A Contemplating. Just contemplating. We had no concrete plans. We weren't even in the study stage, but we were contemplating, yes.

Q Had you entered -- had Anheuser-Busch entered into discussions with the Marriott Corporation in connection with the consideration of the construction of a hotel or motel ~~at~~ Busch Gardens adjacent to the Old Swiss House?

A Not in terms of consideration. Just an exploratory conversation.

Q But there were exploratory conversations with the Marriott Corporation? A 'I must say that I honestly don't know. We had been talking to Marriott about a hotel at Williamsburg. In the course of those conversations, we very well may have talked to them about a hotel at Tampa.

Q Prior to/or during August of 1973, had you discussed - Anheuser-Busch discussed with Marriott Corporation the taking over by Marriott Corporation of the operation and management of the Old Swiss House? Mr. Kheel, I note that you gave Mr. Long a copy of a memoranda dated August 6th, '73, Inter-Office correspondence. I have that document. I prefer Mr. Long testify ~~testifie~~ from memory. I'll then refresh his recollection with the document, myself.

MR. KHEEL: Well, all right.

THE WITNESS: Will you restate the question, please?

MR. SCHAEFFER: Read back the question.

(Whereupon the reporter read the record as directed)

THE WITNESS: Discussed the possibility of the feasibility of, yes.

MR. SCHAEFFER: Had Marriott Corporation informed you, prior to August 6th, 1973, that they would only be willing to take over the operation and management of the Old Swiss House/Busch Gardens in Tampa, Florida if a hotel and motel -- or motel were built at that location adjacent to

the Old Swiss House?

A Definitely not.

Q Had the Marriott Corporation told you that they would be willing to take over the operation and management of the Old Swiss House, even if a hotel or motel were not built adjacent to the Old Swiss House?

A There was no conclusions, so they could not tell us anything concrete.

Q Without characterizing a statement as being concrete or otherwise, prior to August 6th of 1973, representatives of Anheuser-Busch had discussions with representatives of Marriott Corporation with respect to Busch Gardens in Tampa, Florida, is that correct?

A That's correct.

Q Can you tell me, prior to August 6th, 1973, what the substance of those conversations were, to your knowledge?

A From memory?

Q From memory as best you can.

A As best I can. In general, we were talking on the possibility of operating a hotel and/or operating the Swiss House.

Q And do you recall whether or not or under what conditions Marriott was willing to take on the operation of either/or both of those facilities?

A From memory, I really cannot.

Q Mr. Long, can you tell me what the Management Committee of Anheuser-Busch, Inc. is?

A Yes. It's a level of Vice Presidents that manage the corporation, that make the decisions as to what items would go to the Board of Directors.

Q Was the Management Committee in existence during the year 1973? A Was a Management Committee in existence?

Q A Management Committee. A Yes.

Q Were you a member of the Management Committee that was in existence on or during August and September of 1973?

A I really don't remember.

Q Are you presently a member of the Management Committee? A I am.

Q Who ~~was~~ is the presiding officer of the Management Committee? A Now?

Q Yes. A August Busch III.

Q And in August and September of 1973, who was the presiding member of the Management Committee?

A From memory, August Busch, Jr.

MR. SCHAEFFER: I'd ask that this document, a three-page Inter-Office correspondence dated August 6th, 1973, signed by Dennis -- or bearing the name of Dennis P. Long to

Mr. August A. Busch III be marked as Plaintiff's Exhibit 36 for identification.

(Whereupon the reporter marked said document Plaintiff's Exhibit No. 36 for purposes of identification)

MR. SCHAEFFER: Mr. Long, do you have a copy of Plaintiff's Exhibit 36 for identification in front of you?

A May I see the front of yours, please?

Q Sure. Off the record.

(Discussion off the record)

THE WITNESS: Yes.

MR. SCHAEFFER: Mr. Long, did you prepare this Inter-Office correspondence?

A Since it bears my name, I must say that I did.

Q Was this Inter-Office correspondence sent to Mr. Busch III? A I honestly can't say that it was, because I didn't sign it.

Q As of August 6th, 1973, were you considering the removal of Restaurant Associates as operator of the Old Swiss House?

A Were we considering the removal of them as operator of the Old Swiss House?

Q Yes. A Yes.

Q Did you contemplate certain problems or prospective problems with the union employees in connection with the removal of Restaurant Associates from the Old Swiss House?

A Yes. We did.

Q Do you recall the nature of those problems?

A Yes. Do I recall?

Q And I have no objection to your making reference to this document. A I'll read this document. I think the first paragraph clearly spells out -- it's not from recall, but it's from what is stated here. Shall I read it?

Q You need not read it if the first paragraph sets -- the first paragraph of Plaintiff's Exhibit 36 for identification sets forth the considerations which you had at that time.

A They were considerations at that time.

Q Based upon your reading of Plaintiff's Exhibit 36 for identification, does that document refresh your recollection as to whether or not you were familiar with the provisions of Plaintiff's Exhibit 5 as of August 6th, 1973?

A They are two different documents. I'd have to read both documents in detail.

Q Well -- A By reading the first paragraph of 36 doesn't tell me whether I'm familiar with something that I signed long before that.

Q I didn't ask you to just read the first paragraph of Plaintiff's Exhibit 36 for identification; more particularly I was referring to the paragraph enumerated I, Plaintiff's Exhibit 36 for identification, which says: "A-B-C's

contract with R. A. expires December 26th, 1973 . . . with a 90-day notification clause, so we must notify them by September 25." Would it be fair to say that based upon a reading of Plaintiff's Exhibit 36 for identification, has your recollection been refreshed as to whether or not on that date, August 6th, 1973, you were familiar with the termination date of the contract, Plaintiff's Exhibit 5, and the Automatic Renewal clause, paragraph 4B of Plaintiff's Exhibit 5?

MR. KHEEL: Could you repeat the question?

(Whereupon the reporter read the record as directed)

THE WITNESS: I could only say what the sentence says in Plaintiff's Exhibit 36, which is that we must notify them of termination of the contract by September 25th.

MR. SCHAEFFER: And it also enumerates the expiration date of the contract, as well?

A It does.

Q Have you had an opportunity to read all of Plaintiff's Exhibit 36 for identification as yet?

A No. Would you like me to take the time?

Q I would like you to.

(Discussion off the record)

MR. SCHAEFFER: Have you had an opportunity to review Plaintiff's Exhibit 36 for identification, Mr. Long?

A I have read it.

Q Mr. Long, does a review of Plaintiff's Exhibit

36 for identification, refresh your recollection that Marriott Corporation was not willing to operate or manage the Old Swiss House at Busch Gardens in Tampa, Florida unless Anheuser-Busch were going to build a hotel at that location?

A I think I must say that I can only remember what the document says. Many things were going on with Marriott in other areas at that time, so it doesn't refresh any particular element. I must say that the document stands for itself.

Q But it does not refresh your recollection as to the state of facts that day?

A It really does not. That was three years ago, and I have three divisions, and that's just one particular action in a three-year period.

Q Does it refresh your recollection that it was clear by August 6th, 1973, that the discussions or negotiations you were having with Marriott Corporation in connection with the take-over of the Old Swiss House would not lead to a firm result before September 25th, 1973?

A Yes. That's correct.

Q And would you say that as of August 6th, 1973, it was your perception that you would not be entering into a contract with Marriott Corporation for the operation of the management of the Old Swiss House prior to September 25th, 1973?

A The word "prior" throws me. Would you restate

that?

MR. SCHAEFFER: Read it back and change "prior" to "before."

(Whereupon the reporter read the record as directed)

THE WITNESS: That's right. I want to say we were never in negotiations.

MR. SCHAEFFER: Discussions?

A Generally exploratory discussions.

Q Did you, in this memorandum, Plaintiff's Exhibit 36 for identification, set out three alternative ~~forces~~ courses of action for Anheuser-Busch referenced to page two of that document?

A I did. I don't know that they were all inclusive, but I did lay out three possible alternatives.

Q And did you, on page three of Plaintiff's Exhibit 36 for identification, state your preference as of August 6th, 1973?

A From the document that I have in front of me, which I did not sign, you're right, I did.

Q Well, did you prepare the document, Mr. Long?

A Yes. I must say I think I did.

Q And as of August 6th, 1973, was it your conclusion that Restaurant Associates should be continued in management -- in the management of that operation of the Old Swiss House beyond December 25th, 1973?

A As of August 6th, 1973, the document says I prefer the third of the three alternatives, which says, "Extend the contract through November of '74 as of August 6th, 1973."

Q Between August 6th of 1973 and September 25th, 1973, did you change your opinion as to what course of action should be followed by Anheuser-Busch as respects the management and operation of the Old Swiss House?

A I can tell you what happened. I can't tell you --

Q Fine. A I terminated the contract.

Q Well, would it be fair to say then that between August 6th, 1973 and September 25th, 1973, you changed your mind as to the alternative that should be elected by Anheuser-Busch in connection with the operation of the Old Swiss House?

A I think I added a fourth alternative; termination of the contract and negotiations ~~the contract in negotiations~~ for a new contract with Restaurant Associates.

Q And did you ever reduce that new alternative to a writing, to a memorandum to Mr. Busch or to any other employee, director or officer of Anheuser-Busch, Inc.?

A I addressed a letter in September to Restaurant Associates terminating the contract.

Q You remember or are you referring now to Defendant's Exhibit A? A Yes.

Q Prior to sending Defendant's Exhibit A to

Restaurant Associates, Inc., had you written any memoranda or correspondence or inter-office correspondence either to your own files or to any officer, director or employee of Anheuser-Busch stating that you intended to terminate the contract with Restaurant Associates?

A I think you mean in between August 6th?

Q I do mean August 6th, 1973 and September 24th, 1973.

A I don't remember.

Q Do you have your files available with you today so that you could check to see if any such memoranda or correspondence exists?

A I don't know what you mean by "available." Not in this office building, so if there would be something, it would be in another office. I don't have anything right here.

Q In preparation for this deposition, did you review the files, which you maintained in your office, to see what memoranda and correspondence and other written documents exist?

A Not every file, no.

Q You testified, did you not, on July 8th, 1975 before the Honorable Milton Pollack in the United States District Court for the Southern District of New York, is that correct?

A Did I testify?

Q Yes. A Correct.

Q Prior to testifying at that trial, had you reviewed your files to see what written memoranda, documents, inter-office correspondence existed as respects the subject matter of this litigation?

A Last July?

Q Yes. A Or prior to that time?

Q Yes. A I assume I did.

(Discussion off the record)

MR. SCHAEFFER: Would you read back the record?

(Whereupon the reporter read the record as directed)

MR. SCHAEFFER: Mr. Long, in making that review of your files last July or before last July, do you recall seeing any memoranda, inter-office correspondence or other document addressed to an officer, employee or director of Anheuser-Busch, Inc. stating in words or substance that you intended to serve notice of termination upon Restaurant Associates by September 25th, 1973?

A Notice of termination of contract?

Q Yes. A I don't recall. It doesn't mean there wasn't, but I don't recall.

Q I would ask you this, Mr. Long: When you have an opportunity, I'd ask that you review your file once again, and if there is any such memoranda, correspondence or document, I ask that you make it available to Mr. Wheel, and

if not otherwise privileged, he will make it available to me. Is that acceptable, Mr. Kheel?

MR. KHEEL: Yes. I think we've given you his entire file before, but, yes, we will undertake to review to see if there's anything else again.

MR. SCHAEFFER: Mr. Long, I show you Plaintiff's Exhibit 22 for identification and ask whether or not you've seen that document before.

A Just before I came down here, I saw it. I don't remember seeing it before. That doesn't mean I didn't.

MR. SCHAEFFER: Excuse me for just one minute. I seem to have misplaced Exhibit 36.

(Discussion off the record)

MR. SCHAEFFER: Mr. Long, prior to writing Defendant's Exhibit A, was the question of whether or not Restaurant Associates -- withdraw that question. Prior to writing Defendant's Exhibit A, was the question of the termination of the contract dated December 8th, 1972, Plaintiff's Exhibit 5, considered by the Management Committee of Anheuser-Busch?

A No.

Q Prior to writing Defendant's Exhibit A, had you discussed with either Mr. Busch, Jr. or with Mr. Busch, III, the fact that you intended to send Defendant's Exhibit A to Restaurant Associates?

A I don't recall.

Q Prior to writing Defendant's Exhibit A, had you informed either Mr. Busch, Jr. or Mr. Busch III, that you intended to terminate Plaintiff's Exhibit 5?

A I don't recall.

Q Did you, Mr. Long, or to your knowledge, did any other officer, employee or director of Anheuser-Busch, Inc. notify the Florida Beverage Control Board of the fact that Anheuser-Busch had terminated Plaintiff's Exhibit 5?

A I don't recall.

Q Have you ever seen any correspondence between Anheuser-Busch and the Florida Beverage Control Board pursuant to which Anheuser-Busch informed the Florida Beverage Control Board that Plaintiff's Exhibit 5 had been terminated?

A I don't recall that I have ever, and I doubt that I would have in my position.

Q Prior to September 24th, 1973, did you inform James R. Bickle that you intended to send a notice of termination to Restaurant Associates?

A Yes. Termination of contract?

Q Yes. A Yes.

Q Did you inform him of that in writing, or was it done orally? A I don't recall. Probably orally.

Q Do you recall the circumstances under which you informed him orally the date whether or not he was present, or

was it over a telephone?

A I wouldn't remember. Too long ago.

Q Do you recall approximately how much in advance of you having -- of September 24th, 1973, that you advised Mr. Bickle that you intended to serve notice of termination?

A I don't remember.

(Discussion off the record)

MR. SCHAEFFER: Mr. Long, was it your intention -- withdrawn. Was it your intention, Mr. Long, in sending Defendant's Exhibit A to Restaurant Associates, Inc. to terminate Plaintiff's Exhibit 5?

A To terminate Plaintiff's Exhibit 5, which is the contract between R. A. and St. Louis? Yes. Terminate the contract.

Q That was your intention? A It was.

Q Did you draft the words of Plaintiff's Exhibit A -- of Defendant's Exhibit A? A Most likely not. Our Legal Department probably did.

Q Do you have a specific recollection?

A No. I really don't, but the carbon copies go to Jim Bickle and Rich Schwartz. Rich Schwartz is one of our legal counsel.

Q Was he the one who was involved in the relationship between Restaurant Associates and Anheuser-Busch?

A I assume he was.

Q Prior to sending Defendant's Exhibit A to Restaurant Associates, Inc., had you read the terms of Plaintiff's Exhibit 5, more particularly paragraph 4B and paragraph 14 of Plaintiff's Exhibit 5?

A 4B was the termination?

Q I gave you the exhibit, which you can take a look at it. It was 4B and 14.

A I can't remember -- let me read 14, please. 4B and what?

Q 14. A 414?

Q No -- off the record.

(Discussion off the record)

THE WITNESS: I don't remember reading this. The intent was to terminate the contract under these terms.

MR. SCHAEFFER: Well, to terminate the contract?

A To terminate the contract.

Q Mr. Long, what arrangements, if any, ~~have~~ had Anheuser-Busch made as of September 24th, 1973, for the operation and management of the Swiss House after December 25th, 1973?

A I'd like to make a point.

Q I'd like you to answer the question. Can you read the question back?

(Whereupon the reporter read the record as directed)

THE WITNESS: I can't answer the question unless

I make a point.

MR. SCHAEFFER: Well, if you want to confer with counsel, that's fine with me.

MR. KHEEL: Can he make a point, and if that doesn't answer your question, can he try to answer the question again?

MR. SCHAEFFER: You will have an opportunity to examine Mr. Long after I'm completed. Although I've noticed the deposition of Mr. Long clearly as an adverse witness, I think that I'm prepared -- that I'm entitled -- excuse me, not "prepared" -- to answer any questions where Mr. Long has knowledge and can give the answers.

MR. KHEEL: I agree. The witness told me and you on the record that he didn't think he could answer the question, and I think that is an appropriate answer to your question.

MR. SCHAEFFER: Fine. Then I will accept that answer that he cannot answer that question.

MR. KHEEL: Without making a point.

MR. SCHAEFFER: Mr. Long, without making a point, can you answer my last question?

A I just said I couldn't without making a point.

Q Fine. As of September 24th, 1973, had Anheuser-Busch made any arrangements for the operation of the Old Swiss House after ~~September 25th, 1973~~ December 25, 1973, with any other operator --

and by "operator" I mean with any other firm, corporation, entity or individual?

A No. Our intention --

Q Again, I'd --

MR. KHEEL: Mr. Long, I think you've answered the question. That's fair enough. If Mr. Schaeffer wants to ask you your intentions, you can answer them.

THE WITNESS: Okay.

MR. SCHAEFFER: Mr. Long, I show you Plaintiff's Exhibit 23 for identification, a letter dated September 17th, 1973, from James R. Bickle to Mr. Vern "Clemments" showing a copy to Mr. -- or to D. P. Long. Did you -- I'm sorry. Have you had an opportunity to read it?

A Yes.

Q Did you receive a copy of Plaintiff's Exhibit 23 for identification on or about September 17th, 1973?

A ~~Carbon copy,~~ I'm copied so I assume I did.

Q Did you have any conversation with Mr. Bickle as respects the contents of Plaintiff's Exhibit 23 for identification, either before September 17th, 1973, or after September 17th, 1973?

A Well, I don't remember a particular instance. I'm sure I did.

Q But you have no specific recollection of a specific conversation with Mr. Bickle relative to the contents

of Plaintiff's Exhibit 23 for identification?

A Not a specific.

Q ~~Did~~ Do you recall whether or not you discussed with Mr. Bickle in connection with Plaintiff's Exhibit 23 for identification, the purpose of the letter, why Mr. Bickle sent that letter to Mr. Clemments?

A No, I can't.

Q Did you note in reading that letter, Plaintiff's Exhibit 23 for identification, on or about September 17th, 1973, that Mr. Bickle proposed a meeting with Mr. Clemments in October to discuss proposed changes in the contract with R. A.?

A That's what it says.

Q And were you aware at the time that you read that letter, Plaintiff's Exhibit 23 for identification, that the notification had to be given to Restaurant Associates pursuant to the terms of Plaintiff's Exhibit 5, at or about or before September 25th, 1973, if Anheuser-Busch wanted to terminate Plaintiff's Exhibit 5?

A Would you reread that?

(Whereupon the reporter read the record as directed)

THE WITNESS: Let me say that I don't remember exactly when I read this letter, other than just now, so I think that answered the other question.

MR. SCHAEFFER: Yes, it does. Mr. Long, after

sending Defendant's Exhibit A, did you prepare any memorandum, correspondence or other document directed to either your own files or to an officer, director or employee of Anheuser-Busch to the effect ~~or~~ in words ~~of~~ or substance that you had terminated Plaintiff's Exhibit 5?

A After, that covers any time from then till now?

Q Correct. A That's very broad and general. I don't remember specifics.

Q You don't remember specifically whether or not you prepared any such memoranda, document or correspondence?

A That's right.

Q After sending Defendant's Exhibit A to Restaurant Associates, Inc., did either you or to your knowledge any other employee, officer or director of Anheuser-Busch enter into discussions with any other individual, entity or corporation between September 24th, 1973 and December 25th, 1973, with respect to the operation of the Old Swiss House after December 25th, 1973?

A Not to my knowledge.

MR. KHEEL: For the record, do you mean immediately after, because at the present time, someone else is operating Old Swiss House.

MR. SCHAEFFER: I think that my question was between September 24th, 1973 and December 25th, 1973.

MR. KHEEL: I apologize.

MR. SCHAEFFER: Would you read back that question, please?

(Whereupon the reporter read the record as directed)

MR. SCHAEFFER: Mr. Long, I show you Plaintiff's Exhibit 24 for identification, a copy of an Inter-Office correspondence from James R. Bickle to you, and ask whether or not you received the original or a copy of Plaintiff's Exhibit 24 for identification on or about December 11th, 1973?

A Yes.

Q With reference to the marginal comments, hand-written comments, which appear in the margins of pages one, two and three of that document, did you make those entries on the document after having received it from Mr. Bickle?

A Yes.

Q And prior to making those marginal comments, did you read the document, Plaintiff's Exhibit 24?

A Yes.

Q Now, with respect to the first sentence of that exhibit, which reads, "A major change, which we wanted to incorporate into the new contract, is a revision of the expiration date, which is currently set at December 26th, 1974." Did you make any marginal comment as respects that first sentence of Plaintiff's Exhibit 24 for identification?

A No.

Q Did you, at or about December 11th, 1973, after

having received Plaintiff's Exhibit 24 for identification, send any written memorandum or inter-office correspondence to Mr. Bickle as respects the first sentence of Plaintiff's Exhibit 24 for identification?

A I don't recall.

Q Once again, I would ask that in the event -- I would ask that you review your files when you have an opportunity, and to the extent that you should find any such documents, I'd ask that you provide them to Mr. Kheel, and if not otherwise privileged, I assume that Mr. Kheel will provide me with copies of those documents. Is that acceptable with you, Mr. Kheel?

MR. KHEEL: It is. Once again, I would like to reiterate, we believe we furnished the entire file to you to the extent that if there is any document in there in connection with the first paragraph of Exhibit 24, it's been made available, but we will review the file again.

MR. SCHAEFFER: Mr. Long, when you sent Defendant's Exhibit A to Restaurant Associates, Inc., were you aware of the provisions of paragraph 14 of Plaintiff's Exhibit 5?

A I don't recall exactly. I must assume that I was.

Q The letter which you did send, Defendant's Exhibit A, was sent through ordinary mail, was it not?

A It so appears.

Q And the letter which you sent, Defendant's Exhibit A, was sent to Restaurant Associates, Inc., was it not?

A Yes.

MR. SCHAEFFER: Off the record.

(Discussion off the record)

MR. SCHAEFFER: Mr. Long, I'd like to show you Plaintiff's Exhibit 25 for identification, an Inter-Office correspondence from Mr. Bickle to you dated December 17th, 1973.

A Yes.

Q Did you receive Plaintiff's Exhibit 25 for identification, or a copy of it?

A That's my writing in the left-hand column, so I must assume that I did.

Q And you received it on or about December 17th, 1973?

A I must assume so.

Q The memorandum indicates that there are attachments, a letter from T. Payne Kelly. Do you have a copy of that letter with you today?

MR. KHEEL: You mean in this conference room? The answer is no. Once again, I'm sure attached in the file it was made available to you, and if you wish us to review the file during the lunch hour, we'll find out what it is.

MR. CARPENTER: It's privileged, a letter from

our counsel.

MR. KHEEL: I indicated in my letter to you I pulled three or four letters from --

MR. SCHAEFFER: Is that one of the letters?

MR. KHEEL: I'll have to check. I'll have to check. I'll let you know over the lunch hour. It may have been made available to you and you did not elect to photocopy it.

MR. SCHAEFFER: It was not made available to me, and I ask that you seek it out. At least I will know what your position is and move accordingly.

Q Mr. Long, on the left-hand column of Plaintiff's Exhibit 25 for identification, there is a marginal handwritten comment. Is that your writing?

A Yes.

Q And can you tell me what you wrote there?

A No, I can't, unless your copy is more clear than mine.

Q Based upon my limited recognition of your handwriting, your initials D. L. and a circle, and I thought the letters above it were "O.K.," but again you wrote it and I didn't.

A I can just see the "K," but I would think that that's probably right.

Q Thank you. The paragraph which -- that entry,

that we just discussed the "O.K., D. L.," apparently states, "In light of this and the fact that these changes could conceivably cause repercussions with the Florida A. B. C., Inc., it might be wise to let the contract stand as is with just the negotiated changes that have been agreed upon by Vern Clemments and myself with your concurrence." By making the marginal entry, which you did on Plaintiff's Exhibit 25 for identification, were you approving the substance of Mr. Bickle's remarks in that paragraph?

A It appears as such on December the 17th, 1973.

Q Can you tell me what the negotiated changes were that had been agreed to between Mr. Clemments and Mr. Bickle with your concurrence?

A No.

Q You don't recall? A I don't recall.

Q Do you know whether or not you have any document that would refresh your recollection as respects what those changes were?

A It appears as if the December 11th, '73 document, which is a letter from Jim Bickle to myself, which is marked Plaintiff's Exhibit 24, lists suggested changes.

Q Can you tell me which changes you had concurred in? A I can only tell you that there are some okays on Plaintiff's Exhibit 24 and Plaintiff's Exhibit 25 that seem to correlate, but I cannot honestly say

that that was the intention of my okay on Plaintiff's Exhibit 25.

MR. SCHAEFFER: Off the record.

(Discussion off the record)

MR. SCHAEFFER: Mr. Long, I show you Plaintiff's Exhibit 27 for identification, an Inter-Office correspondence from you, three pages dated January 29th, 1974 to Mr. Busch III. Off the record.

(Discussion off the record)

MR. SCHAEFFER: The first sentence -- by the way, did you send the original of this document, Plaintiff's Exhibit 27, to Mr. Busch III on or about January the 29th, 1974?

A I must assume that I did.

Q The first sentence of that document states: "As you know, we have extended our contract with Restaurant Associates . . . for the Old Swiss House and in-park food services in Tampa . . . through November 4th, 1974." Is that correct?

A Is that what it says?

Q Is that what it says? A Are you asking me that question?

Q I think we both can see that that is what it says. A That's what it says.

Q Had you, in fact, as of January 29th, 1974, extended your contract with Restaurant Associates through

November 4th, 1974?

A What this says is that, in effect, we had sent the contract, a revised contract, to R. A. We had not received a signed contract.

Q Is there anywhere in that memorandum, Inter-Office correspondence a reference or statement to the fact that you had sent a signed contract to Restaurant Associates and had not as yet received it back?

A May I read this?

Q Sure. A No. It was my assumption at that point that the contract would be signed and returned.

Q And you made that assumption in writing the first sentence of Plaintiff's Exhibit 27 for identification?

A I assume so.

Q You're now assuming that you made that assumption?

A That's right.

Q Mr. Long, as of January 29th, 1974, is it your testimony that a signed contract had been sent to Restaurant Associates for execution by Restaurant Associates, providing for Restaurant Associates to remain at the Old Swiss House and the in-park food services through November 4th, 1974?

MR. KHEEL: Is the assumption when you say "signed," it was signed by Busch in your question?

MR. SCHAEFFER: Perhaps. Go back a couple of questions. I think that that might illuminate this question.

(Whereupon the reporter read the record as directed)

MR. SCHAEFER: I'll withdraw that last question. We'll just note that in asking the last three or four questions, I apparently misunderstood what Mr. Long said in answer to a question approximately five back when he said that a revised contract had been sent to Restaurant Associates. I heard that to be "a signed contract." So that I certainly apologize for making that mistake, and my comments reflect the word "signed." Obviously, they don't reflect what Mr. Long's testimony was in that question.

Q Is it your testimony, Mr. Long, that at the time you wrote Plaintiff's Exhibit 27 for identification, that a revised contract had been sent to Restaurant Associates?

A As the best I can remember, yes.

Q Do you recall when the revised contract was sent by Anheuser-Busch to Restaurant Associates?

A No.

Q I show you Defendant's Exhibit B, a letter dated January 28th, 1974, from James R. Bickle to Mr. Vern Clements, attaching thereto and part of the exhibit is a document characterized a named amendment to the Agreement. Do you have it there?

A Yes.

Q Had you received a copy of the letter dated January 28th, 1974, from Mr. Bickle to Mr. Clements?

A I'm not carboned, and I honestly don't remember.

Q Is it your understanding that as of January 29th, 1974, a revised Agreement had been sent to Restaurant Associates, or that a rough draft of an amendment had been sent to Restaurant Associates?

A Yes.

Q Which of the two did you believe had been sent to Restaurant Associates? A I don't recall.

Q Mr. Long, after January 29th, 1974, and prior -- withdraw the question. Between January 29th, 1974, and April 25th and ~~April 24th, 1974,~~ April 25, 1975 did you send any written communication, inter-office memoranda, correspondence to Mr. Busch III informing him that the -- that a revised Agreement had not been signed between Restaurant Associates and Anheuser-Busch?

A I don't specifically remember that. That's a fourteen-month period. Is there anything in the files?

Q I think it's -- yes.

MR. KHEEL: Once again, Mr. Schaeffer, we made available to you, as far as we know, the entire file.

MR. SCHAEFFER: Well, to the extent that any such communication or correspondence becomes known to you after review ~~with~~ of your files, I assume that you would make that available to Mr. Kheel, who would then make it available to me, ~~though~~ unless otherwise privileged, I have reviewed the files made available to me and saw no such document. Did there

come a point in time, Mr. Long, that you became aware that Restaurant Associates had not signed the Agreement, which was attached to Mr. Bickle's letter of January 28th, 1974?

A I was very much aware of the fact that they had not signed it all along.

Q Were you at any time under the impression that Restaurant Associates Industries, Inc. had executed the Amendment to Agreement, which was sent to Mr. Clemments by Mr. Bickle on or about January 28th, 1974?

A Will you read the question back, please?

(Whereupon the reporter read the record as directed)

THE WITNESS: Definitely not under the impression that they had signed the contract.

MR. SCHAEFFER: I'm sorry. Could I have the question reread?

(Whereupon the reporter read the record as directed)

MR. SCHAEFFER: Mr. Long, with respect to Plaintiff's Exhibit 27 for identification, the second sentence of that memorandum, which states in part: "It is our intention to notify Restaurant Associates on August 5th, 1974 that we have a new ~~contract prior~~ contractor for the Swiss House," and continuing on -- I won't quote any further -- why, in your memo to Mr. Busch, did you suggest that Anheuser-Busch would notify Restaurant Associates on August 5th, that particular date

August 5th, 1974, that you had a new ~~contract afore~~ contractor for the Swiss House?

A I don't recall.

Q Mr. Long, I show you Plaintiff's Exhibit 28 for identification, an Inter-Office correspondence from you to Mr. Bickle, noted confidential, dated September 26th, 1974.

A I have a copy.

MR. SCHAEFFER: Off the record.

(Discussion off the record)

MR. SCHAEFFER: Did you send the original of Plaintiff's Exhibit 28 for identification to Mr. Bickle on or about September 26th, 1974?

A That's my signature -- or my initials.

Q Roman numeral II in Plaintiff's Exhibit 28 for identification states: "Please advise the ~~next~~ net changes of this Agreement from the previous one." Can you tell me what you were referring to when you use the words "the previous one"?

A I assume what I was talking about was the last signed contract, which was that which was terminated in September of '73.

MR. SCHAEFFER: Would you please read that back?

(Whereupon the reporter read the record as directed)

MR. SCHAEFFER: Was it your impression at the time that you wrote Plaintiff's Exhibit 28 for identification, more particularly with respect to the sentence after Roman

numeral II, that the Plaintiff's Exhibit 5 had been terminated?

A Will you tell me what Plaintiff's Exhibit 5 is?

Q I'll give it to you.

A Now, will you reread the question?

(Whereupon the reporter read the record as directed)

THE WITNESS: The sentence after Roman numeral II -- is that Roman numeral III?

Q Yes. A And you're saying that when I wrote that sentence, was I aware of the fact that the contract had been terminated?

Q Well, I'm asking you when you wrote the sentence -- I think you misunderstood. I was referring to the sentence, which is Roman numeral II.

A Not the sentence after?

Q Not the sentence after. The sentence which is Roman numeral II, were you aware, when you wrote that sentence, which follows Roman numeral II.period, were you under the impression that the Plaintiff's Exhibit 5 had been terminated?

A I must assume that I was, because I terminated it in September of '73.

Q And what was your understanding at the time that you wrote Plaintiff's Exhibit 28 for identification as to the relationship between Restaurant Associates and Anheuser-Busch?

A We had no written Agreement. We had no meeting

of the minds. We were working toward another contract.

Q Did you, at the time you wrote September -- the memo, which is Plaintiff's Exhibit 28 for identification, believe that there was an agreement, oral or written, between Restaurant Associates and Anheuser-Busch relating to the operation of the Old Swiss House?

A There was no agreement in my mind.

Q You ~~believe~~ believed then as of September 26th, 1975, that there was no -- 1974, that there was no agreement between Restaurant Associates and Anheuser-Busch as respects the management or operation of the Old Swiss House?

A There was no agreement.

Q I will call your attention now to the sentence following Roman numeral VII, which reads -- of that same memoranda, Plaintiff's Exhibit 28 for identification, which reads: "Finally . . . tell R. A. we want a signed contract -- ON TIME." Can you tell me what you meant when you wrote those words?

A I can tell you exactly what I meant when I said "Tell R. A. we want a signed contract." That's what I meant.

Q I was more particularly interested in the use of the words "ON TIME," frankly.

A I can't recall, unless it had something to do with the contract that was sent R. A. by Jim Bickle that calls for a specific time, but I cannot be more exact than that.

Q So that you do not have any specific recollection as you sit here today what you meant when you used the capital letters "ON TIME" in your memorandum of September 26th, 1974?

A ~~I only recollected~~ My only recollection from that memo is that we did not have a signed contract.

Q And you do not have any specific recollection as to why you used the words "ON TIME"?

A I do not.

MR. SCHAEFFER: Off the record.

(Discussion off the record)

MR. SCHAEFFER: Mr. Bickle -- excuse me, Mr. Long, I show you Plaintiff's Exhibit 29 for identification, an Inter-Office correspondence marked "Confidential" from you to Mr. Bickle dated October 30th, 1974.

A Yes.

Q Did you send the original of Plaintiff's Exhibit 29 for identification to Mr. Bickle on or about October 30th, 1974?

A My initials, I assume I did.

Q I refer your attention to page two of Plaintiff's Exhibit 29 for identification, Roman numeral II, which reads: "Signed Contract" and beneath it: "As I understand it . . . the contract with R. A. expires this week. Has Tolve returned our contract?" Mr. Long, which contract were you referring to in that sentence?

A Which sentence?

Q The sentence which reads: "As I understand it . . . the contract with R. A. expires this week."

A Well, I can't recall exactly since that was some time ago. I think I must differentiate between the contracts that are mentioned and the two sentences. The bottom sentence, "Has Tolve returned our contract?" That's the written or the signed Agreement. I must assume that when I talk about the contract in the previous sentence, the one that says, "The contract with R. A. expires this week -- " and this is broad and general and it's from recollection -- that it's, more or less, the moral obligation that I felt that we had with R. A. That's the point that I was trying to make before. From the time that we terminated the contract in September of '73, all the time that we were working on another contract, we were doing so for two reasons; one, to keep the business operating, secondly, we really sincerely wanted to reach an agreement with R. A. We felt we had an obligation to do so, first of all to ourselves to get ~~perpa-~~ continuity ~~tuity~~ of the business, and, secondly, to R. A. since they had been in there for that period of time, and we certainly didn't want to injure them in the business sense. So I must assume that when I wrote that, that in my mind, I meant that my moral contract, my business obligation to them; not the written Agreement, not the legal contract, I'm not a lawyer,

expired as of that week.

Q So that, in effect, what you're saying is that your use of the word "contract" in the first sentence under Roman numeral II of Plaintiff's Exhibit 29 for identification refers to and means moral obligation and not contract?

A In a business sense, not in a legal sense. I must assume that that's what I meant at the time.

Q Is it your testimony that at the time you wrote that sentence in Plaintiff's Exhibit 29 for identification, that you were not under the impression that there was a contract between Restaurant Associates and Anheuser-Busch that expired the week following October 30th, 1974?

A I would have to have that read back.

(Whereupon the reporter read the record as directed)

THE WITNESS: I don't understand it. You're going to have to rephrase it. I'm sorry.

MR. SCHAEFFER: Mr. Long, when you wrote the sentence in Plaintiff's Exhibit 29 for identification, which is: "As I understand it . . . the contract with R. A. expires this week," was it your impression that you had a contract with R. A., which expired in the week following October 30th, 1974?

A Is that your question?

Q Yes.

A I was never under the impression that we had a signed Agreement or a meeting of the minds with R. A.

Q Were you ever of the impression that you had an oral agreement with R. A. pursuant to which R. A. was operating the Old Swiss House after December 25th, 1973?

A We had no agreement whatsoever.

Q Then can you tell me what the circumstances were pursuant to which Restaurant Associates managed and operated the Old Swiss House and the other in-park feeding facilities, snack bars and what not, at Busch Gardens in Tampa after December 25th, 1973?

A Circumstances were?

Q Under what conditions? A Searching for an agreement, searching for a signed contract, and trying to keep the business open.

Q Mr. Long, pursuant to Plaintiff's Exhibit 5 --

MR. KHEEL: Off the record.

(Discussion off the record)

MR. SCHAEFFER: -- what rent was Restaurant Associates obliged to pay with respect to the feeding facilities, other than the Old Swiss House, for the period ending December 25th, 1973?

A To answer that question, I would have to read the contract.

Q You want to take a look at it? There will be a couple of questions based on the contract.

(Whereupon a recess was taken, after which the

following proceedings were had:)

MR. SCHAEFFER: Can you read back that last question?

(Whereupon the reporter read the record as directed)

THE WITNESS: Let me clarify when you say "other than the Old Swiss House," that you're talking about in-park fast food operations?

MR. SCHAEFFER: That is correct.

A Let me read from page four item five. It says: "With respect to the business at the snack bars, juice bars, pretzel stands, food carts, and all other food and beverage operations, excluding parenthetically one above parenthetically small letter (a) for the term year commencing December 26th, 1971, thirty-five per cent of the aggregate gross daily receipts therefrom and for the term year commencing December the 26th, 1972 and for each term year thereafter, forty per cent."

Q Do you know, Mr. Long, the percentage of the aggregate gross daily receipts as respects those operations, which was paid by Restaurant Associates for the term year which commenced December 26th, 1972, and which terminated December 25th, 1973? I'm asking you now not what the contract ~~revised~~ provided, but what was actually paid.

A I don't know.

Q Are you aware that there came a point in time

after January the 1st, 1974, that Restaurant Associates was paying a percentage equal to thirty-five per cent of the aggregate daily gross receipts as respects the in-park food facilities, other than the Old Swiss House?

A Thirty-five per cent as opposed to forty per cent?

Q Correct. A I can say yes, that I'm aware of that.

Q And was that pursuant to an agreement between Restaurant Associates and Anheuser-Busch?

A Yes, it was.

Q And can you tell me who, on behalf of Restaurant Associates, made that agreement, if you know, and who, on behalf of Anheuser-Busch, made that agreement?

A Restaurant Associates, I don't know. I must assume that Jim Bickle made that agreement, and I must assume that he did so as he did in some of the other items to keep the business operational.

Q Did he speak with you before he entered into that agreement with Restaurant Associates?

A I'm sure he did. I don't remember exactly, but he must have.

Q At the time -- do you know at or about when that agreement was reached? A I don't recall.

Q Do you know whether at or about the time that

agreement was reached as respects the percentage payments, whether there was any other agreement as respects any other provisions between Restaurant Associates and Anheuser-Busch?

A I don't remember exact provisions, but I can say that despite the fact that there was no written agreement, there must have been some agreements reached to keep the business operational.

Q Can you tell me, to the best of your recollection, today what agreements were reached for the period subsequent to -- or as respects the period subsequent to December 25th, 1973 between Restaurant Associates and Anheuser-Busch?

A I honestly cannot. I just know that there was no over-all agreement, no written signed contract.

Q Referring back to Plaintiff's Exhibit 29 for identification -- and once again, the sentence we had discussed before, you stated that -- and I'll characterize your words, if I can; if you feel it's an unfair characterization, feel free to change it -- that in using the word "contract" in the sentence directly under Roman numeral II, you were really expressing what to you was, in effect, a moral obligation as opposed to a binding contract? Would that be fair to say?

A Yes.

Q And again -- I'm just trying to characterize

your testimony -- why, Mr. Long -- withdrawn. Was it your opinion or impression at the time you wrote Plaintiff's Exhibit 29 for identification that the moral obligation expired in the week following October 30th, 1974?

A As I previously mentioned, I don't recall exactly why I said what I said. The moral obligation is an assumption on my part at this time. I can't be any more specific than that.

Q Mr. Long, subsequent to November 7th, 1974, did you receive from Mr. Bickle a draft Agreement which had been prepared by Restaurant Associates as respects the operation of the Old Swiss House?

A Subsequent to?

Q November 7th, 1974. A I don't recall.

Q Well, if you will look at Plaintiff's Exhibit 7, marked from the preliminary hearing, I might ask you to ignore the cover page, which is a letter from Ms. Bernstein to Mr. Bickle, but look at the attachment which came with the letter. Have you ever seen Plaintiff's Exhibit 7 before today?

A I don't recall.

Q I show you Plaintiff's Exhibit 30 for identification -- off the record.

(Discussion off the record)

MR. SCHAEFFER: I show you Plaintiff's Exhibit

30 for identification, a handwritten memorandum of Mr. Bickle to Bill T. and Denny L. Did you receive a copy of Plaintiff's Exhibit 30 for identification on or about December 2nd, 1974?

A I think I did. It says received by my office. It says to review, I think. As a result of this, I sent a note to Jim Bickle either asking him to outline the specific changes and/or then somewhere in that time framework, going back to Jim Bickle and saying that the proposed changes were not acceptable, and that we should terminate entirely.

Q Do you have a copy of that memorandum with you today?

MR. KHEEL: I'm not clear which one you're asking about, because I think he referred to several.

MR. SCHAEFFER: The one I'm interested in -- I'm interested in all of them -- but the one that creates the greater interest is the one that Mr. Long says the proposed changes are not acceptable, and that Anheuser terminated the contract.

MR. KHEEL: We have previously furnished you -- and I believe you have a copy of a memorandum dated 12/3 in handwriting of Mr. Long, and I'll ask him if this is the memo he was referring to. I don't know for sure that it is.

THE WITNESS: This is the memo that I was referring to. May I read it?

MR. SCHAEFFER: Well, I'll tell you what I will

do. This is the same.

A Yes.

Q I ask that this document, a two-page handwritten document, dated December 3rd stating at the top "When You Say Budweiser, You've Said It All," Jim B. to Bill T., signed by Mr. Long be marked as Plaintiff's Exhibit 37 for identification.

(Whereupon the reporter marked said document Plaintiff's Exhibit No. 37 for purposes of identification)

MR. SCHAEFFER: All right. Mr. Long, I show you Plaintiff's Exhibit No. 37 for identification and ask if you wrote Plaintiff's Exhibit 37?

A Yes, I did.

Q Now -- and did you write it on or about December 3rd, 1974?

A Yes. That's the date on there, yes.

Q Prior to writing Plaintiff's Exhibit 37 for identification, had you read Plaintiff's Exhibit 7, the proposed draft Agreement prepared by ~~Mr.~~ Ms. Bernstein of Restaurant Associates?

A I either read the Agreement or had the proposed R. A. changes, which is the reason why they hadn't signed the contract, outlined for me.

Q And you don't recall which?

A I don't recall which.

Q You have no specific recollection, as you sit here today, of ever having read Plaintiff's Exhibit 7 in its entirety?

A I have no recollection, as I sit here today, because I had not signed an agreement.

Q In your memorandum, Plaintiff's Exhibit 37, second page, you write: "At least make it clear that we have not reached agreement. Therefore, no contract has been made." It is followed by an additional sentence. Was it clear to you, Mr. Long, as you wrote Plaintiff's Exhibit 37 for identification, that there was no agreement between Restaurant Associates and Anheuser-Busch?

A Very clear to me there was no agreement.

Q Why was it then -- why then did you direct, by way of this memo to Mr. Bickle and Mr. Thurman, to make it clear to Restaurant Associates that Anheuser-Busch and the Restaurant Associates had not reached an agreement?

A I really can't say. It was just very clear to me.

Q And you don't know why you wrote that sentence, is that correct? A No. That's correct.

Q Mr. Long, I show you Plaintiff's Exhibit 31 for identification, a memorandum or Inter-Office correspondence dated January 27th, 1975, to Mr. Dennis P. Long and Mr. William H. Thurman, a one-page document. I would indicate

in your presence that earlier this morning, prior to the commencement of the deposition, Mr. Kheel gave to me a one-page document, which starts with page two showing to Mr. Dennis P. Long and Mr. William H. Thurman of January 28th, 1975 and signed by Mr. Bickle. I'd ask that that document be marked as Exhibit 31A.

(Whereupon the reporter marked said document Plaintiff's Exhibit No. 31A for purposes of identification)

MR. SCHAEFFER: I ask you to look at Plaintiff's Exhibit 31 and Plaintiff's Exhibit 31A and ask you if those two pages were attached and whether you received them together on or about January 28th, 1975?

A I don't know. I say that because the first page says January 27th and the second page is January 28th.

Q I also note that it would appear to be two different typewriters. I'm not an expert at this, and I've never worked for the CIA, but it would certainly appear that way.

MR. KHEEL: I think it's the right page. It's just very peculiar. It explains why we didn't get it.

THE WITNESS: I can't answer your question.

MR. SCHAEFFER: All right. Well, do you recall when you received Plaintiff's Exhibit 31 for identification, whether it was a one-page document or two-page document?

A I don't even recall getting the document.

Q Do you recall seeing Plaintiff's Exhibit 31 for identification before today? A I must have since that's my initials on the note.

Q You made the handwritten entries on Plaintiff's Exhibit 31 for identification? A That's right.

Q How about Plaintiff's Exhibit 31A for identification? Do you have any specific recollection of seeing that before today?

A No, I don't. No, I don't.

MR. SCHAEFFER: Excuse me for just one moment.

(Discussion off the record)

MR. SCHAEFFER: Mr. Long, you received Plaintiff's Exhibit 31 for identification on or about January 28th, 1975, isn't that correct?

A It appears so, yes.

Q And the handwritten notations that appear on that Inter-Office correspondence are yours, are they not?

A Yes. They are.

Q And did you, pursuant to those handwritten entries, authorize Mr. Bickle to negotiate with Mr. Sherman as respects Mr. Sherman's management and operation of the Old Swiss House?

A Negotiate is a bit too far. What I said was to pursue.

Q To speak with him? A Yes, to speak with

him.

Q Were you aware, on January 27th, 1975, that Mr. Sherman was an employee of Restaurant Associates?

A Was I aware of that?

Q Yes. A When I made this note, yes.

Q Yes. And was Restaurant Associates, as of January 27th, 1975, managing as agent for Anheuser-Busch the Old Swiss House in Tampa, Florida?

A Yes.

Q Were you aware, when you made your handwritten entries on Plaintiff's Exhibit 31 for identification, that Mr. Sherman had been employed by Restaurant Associates for a great number of years?

A No.

Q Did you know for how long Mr. Sherman had been employed by Restaurant Associates?

A I didn't have the slightest idea.

Q Were you aware, on January 27th, 19 -- on January 29th, 1975, ~~where~~ when it appears that you made these handwritten entries, that Mr. Sherman was employed by Restaurant Associates as General Manager for operations at the Old Swiss House?

A Yes.

Q Were you aware that Mr. Sherman was, in effect, on behalf of Restaurant Associates, the chief operating

officer at the Old Swiss House, the General Manager of the facility?

A General Manager, but I don't know what you mean by "chief operating officer."

Q Chief operating officer of the facility.

A No. I really don't know, because there was someone else involved, and we dealt more with him. I can't think of his name.

Q Was that Mr. Clemments? A Yes.

Q Mr. Sherman, as of January 27, 1975, was present at the Swiss House on a day-to-day basis to operate the facility?

A Yes, he was.

Q Was it clear to you at that time, on January 29th, 1975, that Mr. Clemments was not always present at the Old Swiss House and had responsibilities to Restaurant Associates, other than with respect to the Old Swiss House?

A Yes.

Q Did you, prior to January 29th, 1975, inform any officer, employee or director of Restaurant Associates that you were -- that Anheuser-Busch was going to engage in discussions -- or had engaged in discussions with Mr. Sherman as respects the retention of Mr. Sherman by Anheuser-Busch to manage the Old Swiss House in place of Restaurant Associates?

A Two points; number one, I did not, in answer to

your question. You said "prior to January 29th."

Q Yes, I did. A No, I did not.

Q To your knowledge, did any other employee, director or officer of Anheuser-Busch, prior to January 29th, 1975, advise any officer or director or employee of Restaurant Associates that Anheuser-Busch either had or was going to discuss with Mr. Sherman the possibility of his becoming the Manager of the Old Swiss House in place of Restaurant Associates?

A I don't know.

Q Between January 29th, 19 -- I'll withdraw the question. Prior to May 27th, 1975, Mr. Long -- withdraw that question. Prior to May 30th, 1975, had any -- had you or to your knowledge had any officer, employee of Anheuser-Busch, officers, employee, director of Anheuser-Busch, informed any officer, employee or director of Restaurant Associates that Anheuser-Busch was speaking with Mr. Sherman in connection with the retention by Anheuser-Busch of Mr. Sherman to operate the Old Swiss House in place of Restaurant Associates?

A I don't know.

Q Did you, yourself, make any such contact?

A I did not.

Q And, to your knowledge, you don't know whether or not any other employee, director or officer did?

A I don't know.

Q Did you, Mr. Long, or to your knowledge, did any other officer, employee or director of Anheuser-Busch, between September 25th of 1973 and May 30th of 1975 speak with any other corporation, entity or person in connection with the retention by Anheuser-Busch of such person, entity or corporation to operate the Old Swiss House? You want that read back?

A Yes.

(Whereupon the reporter read the record as directed)

THE WITNESS: I think you ought to say what person or entity or corporation you're talking about.

MR. SCHAEFFER: I think I like the question as it is, and I'd appreciate an answer to the question, and perhaps we can pursue more specifically.

A I can't answer the question. Reread the question again, will you, please?

MR. KHEEL: Off the record.

(Discussion off the record)

THE WITNESS: Rephrase the question or let's reread the question.

(Whereupon the reporter read the record as directed)

THE WITNESS: I'm sorry. I don't understand the question, because you say "of such person," and there's no reference to such person or entity or corporation.

MR. SCHAEFFER: I'll break up the question.

Between September 25th, 1973 and May 30th, 1975, did you, Mr. Long, personally have discussions or a discussion with any person, firm or corporation, other than Restaurant Associates and Sidney Sherman, with respect to the retention by Anheuser-Busch of such person, firm or corporation to manage the Old Swiss House?

A Not to my knowledge.

Q The question I asked you personally whether you had any such conversation, and I would ask -- I assume you would have knowledge of conversations you personally participated in. Did you personally have any such conversations?

A Let me restate my answer.

Q Okay. A I had no such conversation. I know of none by anyone else.

Q By any other employee, director or officer of Anheuser-Busch? A That's right.

Q My next question would be: With respect to the officers, directors or employees of Anheuser-Busch, other than yourself -- and I think you've answered the question to the effect that you say you have no knowledge of any such conversations.

A That's right.

Q Thank you. Did you personally, Mr. Long, speak with Mr. Sherman in connection with the retention by Anheuser-Busch of him or Sherman Management Corporation, to operate

the Old Swiss House?

A Not to my knowledge.

Q Is it your testimony that you had no discussions with Mr. Sherman with respects to his retention by Anheuser-Busch to manage the Old Swiss House?

A Yes.

Q Are you aware of discussions had by other employees of Anheuser-Busch with Mr. Sherman with respect to his retention by Anheuser-Busch to manage the Old Swiss House?

A In any time framework?

Q Yes. In any time framework. A Yes.

Q Can you tell me what knowledge you have of conversations between Mr. Sherman and employees of Anheuser-Busch with respect to Mr. Sherman's retention to manage the Old Swiss House -- and I should say when I say "Mr. Sherman's retention," I'm also referring to the retention of Sherman Management Corporation, which was a corporation formed by Mr. Sherman.

A Knowledge I have at this point is, one, Plaintiff's Exhibit 31, and, two, the fact that Sid Sherman's Management Corporation is now operating the Swiss House.

Q Well, did you -- have you had conversations with Mr. Bickle between January 1st of 1975 and May 30th of 1975 relative to meetings and/or conversations that Mr. Bickle had with Mr. Sherman as respects retention by him of -- retention

of him by Anheuser-Busch to manage the Old Swiss House?

A Plaintiff's Exhibit 31 is one of those -- not conversations, but written documents. I must have had some conversations, because we eventually retained him. I cannot recall a specific event.

Q Mr. Long, I show you Plaintiff's Exhibit 9 for identification -- 9 marked at the hearing, preliminary session of this matter.

A Yes.

Q It is a letter dated August 1st, 1974 from Mr. Bickle to Mr. Clemments. Did you receive a copy of this letter?

A I don't recall.

Q Do you recall having seen this letter before today? A Before today?

Q Yes. A No. I don't recall.

Q Were you aware before today that on or about August 1st, 1974, Mr. Bickle sent a letter by registered mail return receipt requested to Mr. Clemments?

A This particular letter?

Q Well, that he had sent a letter to Mr. Clemments by registered mail return receipt requested on or about August 1st, 1974?

A I know that they were having correspondence to try to reach an agreement so that we could sign a contract,

but I can't remember this particular incident or any particular incident.

Q Do you recall today ever having had any conversations with Mr. Bickle relating to Plaintiff's Exhibit 9?

A I can't honestly remember.

Q Do you have knowledge as to the Agreement capital A that Mr. Bickle was referring to in the first sentence of Plaintiff's Exhibit 9?

A No.

Q I'm sorry. Did you answer that?

MR. KHEEL: He said "No."

MR. SCHAEFFER: Mr. Long, I show you Plaintiff's Exhibit 33 for identification.

A I have a copy.

Q Did you receive a copy of Plaintiff's Exhibit 3 for identification?

MR. KHEEL: 33.

MR. SCHAEFFER: Excuse me. 33 for identification on or about April 23rd, 1975?

A I must assume that I did.

Q Sorry? A I must assume that I did.

Q I will show you another copy of Plaintiff's Exhibit 33 for identification, which I received from your counsel, Mr. Kheel, during document discovery, which has a handwritten entry on the top right-hand side. I ask that that

be marked as Exhibit 33A.

(Whereupon the reporter marked said document Plaintiff's Exhibit No. 33A for purposes of identification)

MR. SCHAEFFER: Off the record.

(Discussion off the record)

MR. SCHAEFFER: The handwritten -- is the handwritten entry, which appears at the top right-hand side of Plaintiff's Exhibit 33A for identification, in your handwriting?

A Yes.

Q And that entry was made by you?

A Yes.

Q Can you read to me what that handwritten entry is? A "R. A. - Meeting . . . Occupancy Fee . . . Legal Opinion . . . . . Memo to File."

Q Can you explain to me what that handwritten entry -- what you intended by that handwritten entry?

A I honestly can't. I must assume that it has something to do with the body of the letter, but honestly, I can't tell you at this time.

Q When you say "the letter," you mean the Inter-Office correspondence? A Yes.

Q I ask you to review the Inter-Office correspondence to see if that handwritten entry takes on any meaning to you.

(Discussion off the record)

THE WITNESS: I think I can tell you what I meant. I was to relay this -- the information outlined in this memo to the Management Committee meeting. Those were notes to myself.

MR. SCHAEFFER: What is the entry "Occupancy Fee" mean, Mr. Long, if you recall?

A I don't recall, and nothing in here says.

Q And what about the entry "Legal Opinion Memo to File"? A I can't tell you what that means, either. The first entry did mean that it had to do with our presentation of the subject to the Management Committee meeting.

Q What was it that had to be presented to the Management Committee? A Under normal circumstances, there was no need to present a change in such an operation to the Management Committee, but since in earlier correspondence there had been some comments -- let me correct myself -- an earlier correspondence and/or conversations, there had been some comments as to a possible threat by Mr. Tolve to remove our beer products from those restaurants that R. A. operates. I felt obligated to take it to the Management Committee meeting.

Q When were you fist advised of the alleged threats by Mr. Tolve to discontinue the use of Anheuser-

Busch products at the restaurants operated and managed by Restaurant Associates?

A I don't remember the exact time.

Q Was it prior to your receipt of Plaintiff's Exhibit 33 for identification? A Yes.

Q Can you approximate how many months or weeks it was prior to that? A I honestly cannot.

Q You had first met Mr. Tolve in 1972?

A I think that's probably right, yes.

Q And you've met with him since that time on a couple of occasions? A Yes.

Q In person? A Yes.

Q You had spoken to him on the phone on a couple of occasions since 1972? A Yes.

Q Did you ever ask Mr. Tolve ~~ever~~ whether or not he had made those threats? A No.

Q Do you know of your own knowledge whether or not Restaurant Associates has, since May of 1975, discontinued the use of Anheuser-Busch products at any restaurants which it manages or operates?

A I have no knowledge.

Q Have you ever made inquiry of the appropriate individual at Anheuser-Busch who would have knowledge of that?

A I have not. The decision was that the Swiss House must stand on its own merits, that matter in my opinion, was

dropped.

Q So that it was of no concern to you as to whether or not Restaurant Associates would continue or would discontinue the use of Anheuser-Busch products at other restaurants which it had managed, operated or owned?

A It was a concern, but it had no bearing on this matter.

Q But you don't know whether or not Restaurant Associates has discontinued the use of its products --

A I do not.

Q -- of Busch products? A I do not.

Q And you've never made inquiry?

A I have not.

Q Mr. Long, I direct your attention to Plaintiff's Exhibit 34 for identification, a memorandum from you to August A. Busch III. Did you send that memorandum to Mr. Busch?

A I did.

Q Tell me who Mr. ~~Owen~~ Orion Burkhardt is?

A Vice President of Beer Marketing.

Q And Mr. Sandy MacDonald?

A General counsel for Anheuser-Busch.

Q I ask that this document be marked.

(Whereupon the reporter marked said document Plaintiff's Exhibit No. 38 for purposes of identification)

MR. SCHAEFFER: Also mark this as Plaintiff's Exhibit 38A -- 39, a handwritten memo from Mr. Long to John Hayward, H-A-Y-W-A-R-D, dated May 12th, 1975.

(Whereupon the reporter marked said document Plaintiff's Exhibit No. 39 for purposes of identification)

MR. SCHAEFFER: Mr. Long, I show you Plaintiff's 38 for identification and ask if you received the original of Plaintiff's Exhibit 38 for identification from Mr. Busch on or about April 25th, 1975?

A Yes.

Q And I show you Plaintiff's Exhibit 39 for identification and ask whether you wrote that memorandum to John Hayward on or about May 12th, 1975?

A Yes.

Q And can you identify Mr. Hayward?

A Mr. Hayward is the Secretary of the corporation.

Q And was the matter of Sidney Sherman's retention and Restaurant Associates' termination of the Old Swiss House taken up on the agenda of the Management Committee meeting?

A I don't recall exactly -- let me say it differently. I don't recall the exact discussion. I do know that the primary -- of primary interest at the Management Committee was the removal of Restaurant Associates from the Old Swiss House and paragraph -- the paragraph on page two

of Bickle's April 23rd memo. Whether or not we specifically discussed Sid Sherman or not, I can't say.

Q Were you present at the Management Committee meeting at which that was discussed?

A Yes.

Q Do you know when that meeting was held?

A No, I don't. I'd have to say in May.

Q Are minutes kept of those meetings?

A Yes.

Q I would request a copy of the minutes of the Management Committee meeting at which the termination of Restaurant Associates agency at the Old Swiss House was taken up.

MR. CARPENTER: Limited to that topic?

THE WITNESS: Yes.

MR. SCHAEFFER: You can limit it to that topic. That's all I'm interested in, except that if there was also discussion relating to the retention of Sidney Sherman, I think that that's relevant, and if it's appropriate, I will be given that. I don't care about any confidential matters taken up.

MR. KHEEL: If there is, we will consider whether we will make it available to you or not. I'll have to take it up.

MR. SCHAEFFER: Can you tell me what, if any-

thing, you said at the Management Committee meeting, Mr. Long, relating to the termination of Restaurant Associates agency at the Old Swiss House?

A No.

Q You have no recollection of what you said?

A No, I don't.

Q Do you have any recollection as to what anyone else said in connection with the termination of Restaurant Associates agency at the Old Swiss House at the Management Committee meeting?

A The only recollection I have is that we were asked by someone on the Committee to have the Vice President of Beer Marketing operations be present. When we advised Ralph Tolve of our decision, the reason being to pursue any problems we may have with retention of our beer products in the Restaurant Associates' restaurant.

Q And was that individual present when Mr. Tolve was informed of the termination -- of the termination of Restaurant Associates agency at the Old Swiss House?

A To the best of my knowledge, he was present. The meeting, of course, was not at the Old Swiss House.

Q I understand that. And who was that individual?

A Michael Lamonica.

Q Mr. Long, I show you Plaintiff's Exhibit 10 for identification and ask if you caused that letter to be

delivered to Mr. Tolve on or about May 27th, 1975?

A Yes.

Q And did you -- withdrawn. Mr. Long, I show you Plaintiff's Exhibit 13. Off the record.

(Discussion off the record)

MR. SCHAEFFER: Mr. Long, did you execute Plaintiff's Exhibit 13 on behalf of Anheuser-Busch?

A Yes.

Q And was that on or about May 30th, 1975?

A Yes.

MR. SCHAEFFER: Off the record.

(Discussion off the record)

MR. SCHAEFFER: We're completed. Thanks very much, Mr. Long.

Dennis P. Long

Subscribed and sworn to before me this 25th day of March, A. D. 1976.

My Commission expires February 28, 1977.

Vivian M. Topolski
Notary Public

PRE-TRIAL ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

RESTAURANT ASSOCIATES INDUSTRIES, INC.,

Plaintiff,

- against -

ANHEUSER-BUSCH, INC.,

Defendant,

- and -

SIDNEY SHERMAN AND SHERMAN MANAGEMENT CORP. as additional defendants because they are or may be needed for an adjudication pursuant to FRCP 19.

----------x

75 Civ. 3018
(MP)

PRE-TRIAL
ORDER

A. STATEMENT OF AGREED FACTS

RESTAURANT ASSOCIATES INDUSTRIES, INC. and ANHEUSER-BUSCH, INC. hereby stipulate that the following facts are not in dispute in this action, each party reserving the right to object to the materiality of any such stipulated fact and its relevance to the issues.

1. Plaintiff RESTAURANT ASSOCIATES INDUSTRIES, INC. ("Associates") is and was at all relevant times a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the City, County and State of New York.

2. Defendant ANHEUSER-BUSCH, INC. ("Busch") is and was at all relevant times a corporation organized and existing under the laws of the State of Missouri, having its principal place of business in St. Louis, Missouri, and is licensed to do business in the State of New York.

3. SIDNEY SHERMAN ("Sherman") is a natural person and a resident of the State of Florida.

4. SHERMAN MANAGEMENT CORPORATION, INC. is a corporation organized and existing under the laws of the State of Florida having its principal place of business in Tampa, Florida.

5. RALPH TOLVE ("Tolve") is a Vice President of Associates.

6. VERNE CLEMENTS ("CLEMENTS") is an employee of Associates.

7. LEONE BERNSTEIN ("Bernstein") is Associate General Counsel for Associates.

8. AUGUST A. BUSCH, III is the President of Busch.

9. DENNIS P. LONG ("Long") is a Vice President of Busch.

10. JAMES R. BICKLE ("Bickle") is an employee of Busch.

11. Busch is and was at all relevant times the owner of certain premises known as BUSCH GARDENS ("Busch Gardens")

located in Tampa, Florida. Busch Gardens is a unique tourist facility on in excess of 250 acres of landscaped grounds containing gardens, lagoons and arbors. Busch Gardens contains and includes numerous tourist exhibits such as a wild animal kingdom, and an aviary and family-oriented amusement and entertainment facilities, boutiques and gift shops and related facilities.

12. Included among the facilities at Busch Gardens are food and beverage service areas consisting of a first class restaurant known as THE OLD SWISS HOUSE (hereinafter referred to as "Swiss House"), and a number of snack bars, juice bars, food stands and food carts. Swiss House is an enlarged replica of a restaurant of the same name in Lucerne, Switzerland built in the early Eighteenth Century and owned by relatives of the wife of AUGUST BUSCH, JR., a past President of Busch.

13. In 1969 Busch requested Associates to make a proposal to operate those facilities.

14. For some time prior to its relationship with Associates, Busch was dissatisfied with the operation by an independent food service company of the food and beverage facilities located in Busch Gardens.

15. On or about October 22, 1969 Associates and Busch entered into an agreement providing for the management by Associates on behalf of Busch of all of the restaurant, snack bar,

food and beverage facilities, including Swiss House at Busch Gardens. The term of that agreement was two years commencing as of December 4, 1969, which term was extended by agreement of the parties until December 25, 1971.

16. Associates and Busch entered into an agreement dated December 8, 1972 (the "Management Agreement") (but actually executed thereafter) providing for the management by Associates on behalf of Busch of all of the restaurant, snack bar, food and beverage facilities including Swiss House at Busch Gardens. The basic term of that agreement was two years commencing as of December 26, 1971.

17. Paragraph 4(b) of the Management Agreement between Busch and Associates provides that:

> "(b) This Agreement shall be automatically renewed for additional term of one (1) year, upon the same terms and conditions contained herein (including without limitation this automatic renewal provision), without further written instrument between the parties, unless either party shall give written notice to the other not less than ninety (90) days prior to the expiration of the initial term or additional term that the agreement shall terminate at the end of the initial term or additional term." (Ex. 5)

18. Paragraph 14 of the Management Agreement between Busch and Associates provides that:

> "14. Notices:
>
> All notices (including but not limited to designations, notifications and reports)

given or required to be given to or by any party shall be in writing and all such notices shall be forwarded by registered or certified mail to the addresses set forth on the first page of this agreement or to such other addresses as either party may notify the other by certified or registered mail. Notices served as herein provided shall be deemed effective and served as of the date of the certified or registered mailing thereof. Notices to Busch shall be to the attention of Mr. Dennis P. Long, Vice President-Corporate Affairs, or his successor, and to Associates shall be to the attention of Mr. Ralph Tolve, Vice President, or his successor."

19. During 1973 the parties discussed making changes in the Management Agreement.

20. On or about September 17, 1973 Bickle sent a letter to Clements (Exhibit 23) (and also sent a copy of that letter to Tolve and others), which letter stated:

"As per my previous discussions with you, there are some points within the Restaurant Associates/Anheuser-Busch contract which are in need of modification. Please consider this letter an official indication of our desire to arrange for a meeting sometime hopefully in October to discuss these changes."

21. On or about September 24, 1973 Long sent a letter to Tolve (Exhibit A), by ordinary mail, which letter stated:

"Please be advised that Anheuser-Busch, Incorporated, desires to renegotiate certain terms of the management agreement which is scheduled to terminate December 25, 1973. This notice is being sent in compliance with the requirements of Paragraph 4(b) of the Management Agreement.

I have asked Mr. James R. Bickle to con-

> tact you shortly in an effort to conclude negotiations with representatives of your company as soon as possible."

Said letter was received by Tolve on September 27, 1973.

22. The Management Agreement was the last written agreement made by the parties.

23. After September 24, 1973 the parties continued to engage in negotiations as respects the continuation of Associates' operation of the food facilities at Busch Gardens.

24. On or about December 11, 1973 Bich'e sent a three page inter-office correspondence to Long (Exhibit 24), the first paragraph of which stated:

> "A major change which we wanted to incorporate into the new contract is a revision of the expiration date, which is currently set at December 26, 1974. We originally proposed that the expiration date for the Restaurant Associates operating contract be moved back to November 4, 1974 to coincide with the expiration of Restaurant Associates' contract with the union. RA then made a counter proposal that the expiration date be moved to January 15 and indicated that they would approach the union to modify their contract to expire on January 15 also. After the union was contacted, they subsequently declined to amend the termination date of their contract to coincide with the RA operating contract, so therefore we have a tentative agreement from RA to have the operating contract expire November 4, 1974 as originally planned."

25. On or about January 28, 1974 Busch submitted a

proposed draft of a new management agreement to Associates (Exhibit B). Said draft stated in its preamble, inter alia:

> "Busch gave Associates timely notice of its intent to terminate the Agreement on December 25, 1973 if it could not renegotiate certain terms of the Agreement. To this end, Busch and Associates have renegotiated certain terms as requested by Busch, as well as certain terms as requested by Associates."

26. On or about January 29, 1974 Long sent a three page inter-office correspondence to AUGUST A. BUSCH, III (Exhibit 27), the first paragraph of which stated:

> "As you know, we have extended our contract with Restaurant Associates...for the Old Swiss House and in-park food services at Tampa... through November 4, 1974. However, we still feel that the service and quality of food at Tampa is not up to our standards, and it is our intention to notify Restaurant Associates on August 5, 1974 that we have a new contractor for the Swiss House...and that we will run the in-park food operations with Busch Gardens personnel."

27. Associates did not sign or return Exhibit B to Busch.

28. Pursuant to negotiations between the parties in 1973 and 1974, the terms of Associates' employment by Busch changed from the terms set forth in the Management Agreement. Among the changes were: (a) Associates would pay a reduced rent from December 26, 1973 until November 4, 1974; and (b) the fast

food management would be turned over to Busch as of November 4, 1974.

29. On or about August 1, 1974 Bickle sent a letter to Clements (Exhibit 9) by registered mail, return receipt requested, which letter stated:

> As provided in our Agreement, we are hereby giving written notice of proposed changes in the upcoming operating contract with Restaurant Associates Industries, Inc.
>
> We will be forwarding shortly for your consideration a letter spelling out the changes as we see them."

30. On or about September 18, 1974 Busch submitted a proposed draft of a new management agreement to Associates (Exhibit 6). Busch sought Associates' comments on the draft and asked Associates to return it to Busch for finalization.

31. Associates did not sign or return Exhibit 6 to Busch.

32. On or about September 26, 1974 Long sent a two page inter-office correspondence to Bickle (Exhibit 28), paragraph VII of which stated:

> VII. Finally...tell RA we want a signed contract - ON TIME."

33. On or about October 30, 1974 Long sent a two page inter-office correspondence to Bickle (Exhibit 29), paragraph II of which stated:

"II. Signed Contract

As I understand...the contract with RA expires this week. Has Tolve returned our contract?"

34. Pursuant to negotiations between the parties, on or about November 4, 1974 Associates turned over to Busch the management and operation of the food and beverage facilities at Busch Gardens except for Swiss House. Associates continued to manage Swiss House until July 9, 1975.

35. On or about November 7, 1974 Associates submitted a proposed draft of a new management agreement to Busch (Exhibit 7).

36. Paragraph XVIII of Exhibit 7 provides, in part, as follows:

"XVIII AMENDMENT AND TERMINATION OF PRIOR AGREEMENT

The parties acknowledge that they entered into a management agreement dated December 8, 1972 ("Prior Agreement") pursuant to which Associates was retained to manage on behalf of Busch all the food and beverage facilities, including The Restaurant, in Busch Gardens, and that the Prior Agreement by its terms would have expired December 25, 1973. The parties further acknowledge and agree that Associates has continued to manage such food and beverage facilities subsequent to December 25, 1973 pursuant to all the terms, covenants and conditions contained in the Prior Agreement except that effective as of December 26, 1973, the Prior Agreement is amended as follows:

1....

3. The Prior Agreement, as herein amended,

is extended for the period commencing as of December 26, 1973 and shall terminate November 3, 1974."

37. Busch did not sign or return Exhibit 7 to Associates.

38. On or about January 1, 1974 Sherman was employed by Associates as its General Manager for Operations at Busch Gardens and continued to be so employed until July 9, 1975. His duties included overall responsibility and supervision of all of the activities engaged in by Associates at Busch Gardens.

39. Sherman was a salaried employee who never served as an officer or director of Associates.

40. Throughout Sherman's term of employment with Associates, his relationship was based on an oral agreement terminable upon reasonable notice by either party.

41. Prior to his employment by Associates as its General Manager for Operations at Busch Gardens, Sherman had been employed by Associates between July 1, 1965 and 1973 as Banquet Manager and Maitre d' of the Tavern on the Green Restaurant in New York, New York.

42. After Associates turned over the management and operation of the food and beverage facilities at Busch Gardens, except for Swiss House, to Busch on November 4, 1974, Sherman continued as Associates' General Manager for Operations at Swiss House until July 9, 1975.

43. In or about January, 1975 Busch commenced discussions with Sherman as respects management by Sherman on behalf of Busch of Swiss House.

44. On or about May 15, 1975 Sherman caused a corporation to be formed under the laws of the State of Florida. The name of the corporation is Sherman Management Corporation, Inc.

45. On or about May 20, 1975 Busch and Sherman Management Corporation, Inc. entered into an agreement (Exhibit 13) providing for the management by Sherman Management Corporation, Inc. on behalf of Busch of Swiss House. Said agreement provided for Sherman and Sherman Management Corporation, Inc. to perform, commencing June 30, 1975, the same services for Busch as had previously been performed by Associates for Busch at Swiss House.

46. Neither Busch nor Sherman advised Associates of the negotiations between Busch and Sherman nor of the agreement between Busch and Sherman Management Corporation, Inc. until on or after May 27, 1975.

47. On May 27, 1975 Busch caused a letter to be hand delivered to Associates (Exhibit 10) which stated:

"Mr. Ralph Tolve, Vice President
Restaurant Associates Industries, Incorporated
1540 Broadway
New York, New York 10036

Re: Agency Agreement dated December 8, 1972
between Anheuser-Busch, Incorporated and

Restaurant Associates Industries, Incorporated involving the operation of The Old Swiss House restaurant.

Dear Mr. Tolve:

By letter of August 1, 1974, we notified you of our intent to terminate the subject agreement as to the terms and conditions then in effect. As we have since been unable to reach agreement as to mutually acceptable terms upon which to continue our relationship, this letter is to notify you of the termination of your agency effective midnight, June 30, 1975.

This letter will also serve to revoke all prior authority given Restaurant Associates Industries, Incorporated to bind Anheuser-Busch, Incorporated to any new contract during the remainder of the term of your agency. Notwithstanding the immediately preceding sentence, you are authorized to continue to purchase such food and beverage inventory items under existing blanket purchase orders as are necessary for the operation of The Old Swiss House.

We trust that as our agent you will assist us in the orderly transition of business to your successor.

Very truly yours,

Dennis P. Long
Vice President and
Group Executive"

48. Associates managed Swiss House on behalf of Busch until July 9, 1975.

49. Sherman Management Corporation, Inc. has managed Swiss House on behalf of Busch since July 9, 1975.

50. Between December 26, 1974 and July 9, 1975

Swiss House had gross receipts (as that term is defined in plaintiff's Exhibit 5) of $1,095,258.

51. Between July 9, 1975 and November 4, 1975 Swiss House had gross receipts (as that term is defined in plaintiff's Exhibit 5) of $545,151.

52. Between July 9, 1975 and December 25, 1975 Swiss House had gross receipts (as that term is defined in plaintiff's Exhibit 5) of $761,496.

B. PLAINTIFF'S CONTENTIONS AS TO DISPUTED FACTS

1. Busch never effectively terminated the Management Agreement.

2. The letter, dated September 24, 1973, from Long to Tolve (Exhibit A) was not effective notice to terminate the Management Agreement because:

(a) The language of that letter did not express a clear, definite and unequivocal intention to terminate the agreement;

(b) The letter was not sent certified or registered mail and was, therefore, ineffective to terminate the agreement;

(c) The letter, in the context of all of the

surrounding circumstances was ambiguous and therefore did not constitute a notice of termination of the agreement;

(d) The letter was directed to the wrong corporation; and

(e) The letter, even if intended to effect a termination of the agreement, was not timely served.

3. Busch, by its letter dated September 24, 1973, did not intend to terminate the Management Agreement.

4. Busch induced Sherman to breach his duty of loyalty and good faith to his master, Associates, by inducing him to bring his personal interest into conflict with his obligations as a fiduciary agent.

5. Busch induced Sherman to violate his obligations to Associates by failing to disclose facts and circumstances which made Sherman's interests adverse to Associates' interests.

6. Busch dealt with Sherman with knowledge that Sherman was acting in violation of his fiduciary obligation to Associates.

7. Busch intentionally and unjustifiedly interfered with the business relationship between Associates and Sherman and such interference resulted in injury to Associates.

8. Associates is entitled to recover damages from Busch in the amount of approximately $175,000 for the loss of

anticipated future profits as respects the operation of Swiss House for the period between July 9, 1975 and December 25, 1975.

C. PLAINTIFF'S PROPOSED CONCLUSIONS OF LAW

1. The requirements of a contract as to notice, as to the time of giving, the form and the manner of service thereof, must be strictly observed in cancelling a contract and there must be exact compliance with the terms of the provision for notice.

2. A notice of termination must be clear, definite and explicit and not ambiguous. A notice is not clear unless its meaning can be apprehended without explanation or argument.

3. Busch's letter dated September 24, 1973 (Exhibit A) was not effective notice to terminate the Management Agreement because it did not comply with the requirements of the Management Agreement as to notice.

4. Busch's letter dated September 24, 1973 (Exhibit A) was not effective notice to terminate the Management Agreement because it was not clear nor definite nor explicit but was ambiguous.

5. Since the September 24, 1973 letter is not a clear and unequivocal notice of termination extrinsic evidence as to Busch's intention in preparing and sending it is admissible.

6. The Management Agreement (Exhibit 5) was not effectively terminated by Busch.

7. Busch's purported termination of Associates' agency at Swiss House as of June 30, 1975 is in violation of the Management Agreement and Associates is entitled to recover damages from Busch in the amount of approximately $175,000 for the loss of anticipated future profits as respects the operation of Swiss House for the period between July 9, 1975 and December 25, 1975.

8. Busch improperly interfered with the confidential relationship between Associates and Sherman in order to secure an advantage for itself and Associates is entitled to both compensatory damages in the amount of approximately $175,000 for the loss of anticipated future profits as respects the operation of the Swiss House for the period between July 9, 1975 and December 25, 1975 and to punitive damages based upon Busch's improper conduct which constituted a violation of the fiduciary duty owed by Busch to Associates.

9. Busch, by negotiating and signing a contract for management of the Swiss House with Sherman with knowledge that Sherman was acting in violation of his fiduciary obligation to Associates became jointly liable with Sherman for the damages sustained by Associates in an amount equal to the actual losses

sustained by Associates as a direct and proximate result of its wrongful acts.

D. DEFENDANT'S CONTENTIONS AS TO DISPUTED FACTS

1. The letter dated September 24, 1973 (Exhibit A) was effective notice to terminate the Management Agreement. The notice was sent within the time limit required therefor and was duly received without objection by the plaintiff as to the timeliness, mode of transmittal or force of the notice given.

2. Defendant intended to terminate the Management Agreement effective December 25, 1973.

3. Pursuant to the September 24, 1973 termination notice, as of December 25, 1973 the parties were operating without any binding agreement between them on an "at will" basis.

4. Prior to January 1975, Sherman had indicated to plaintiff and Busch that for strong personal reasons he would not leave the Tampa, Florida area and if transferred he would resign from Associates' employ.

E. DEFENDANT'S PROPOSED CONCLUSIONS OF LAW

1. Where a contract provides for termination by written notice, any reasonable and clear form of notice is sufficient to effect termination. If the giving of notice is a condition precedent to the termination of the contract, such provision should be liberally construed, with the true intent and purpose of the parties and the ordinary rules of trade being kept in mind.

2. Defendant's letter dated September 24, 1973 constituted a valid and effective notice of termination of the Management Agreement. By its terms this letter complied with paragraph 4(b) of the Management Agreement and expressed a clear and unequivocal intent to terminate the contract.

3. Since the September 24, 1973 notice (Exhibit A) is a clear and unequivocal notice of termination, extrinsic or parol evidence as to defendant's intention in preparing and sending it is irrelevant and immaterial.

4. As the September 24, 1973 letter constituted a valid termination notice, the Management Agreement terminated and was of no further force and effect.

5. The fact that the notice (Exhibit A) was sent by regular mail instead of registered mail, as stipulated in the

contract, is immaterial since plaintiff concedes that the notice was received and plaintiff cannot demonstrate prejudice.

6. Where parties conduct business on an informal basis without oral or written agreements, the relationship between the parties is a contract terminable at the will of either party.

7. After December 26, 1973, plaintiff and Busch's business relationship was governed by an informal, unwritten understanding or agreement, the terms of which changed from time to time as and when and if the parties so agreed. Either Busch or plaintiff was legally free to terminate their informal agreement at will upon reasonable notice to the other party.

8. Defendant legally and without obligation to plaintiff terminated its relationship with Associates effective as of June 30, 1975 and requested plaintiff to remove itself from The Old Swiss House.

9. Sherman was employed by plaintiff on an at-will basis terminable by him or plaintiff at any time. Busch has no liability for inducing Sherman to terminate an at-will contract.

10. Sherman had no duty to plaintiff to disclose that he was considering doing business with Busch nor did Sherman breach any obligations he owed to plaintiff by negotiating with and signing a contract with Busch.

11. Busch had no duty to plaintiff to disclose that it was considering doing business with Sherman nor did Busch breach any obligation it owed to plaintiff by negotiating with and engaging Sherman.

F. Plaintiff conducted depositions upon oral examination of the defendant by James R. Bickle and Dennis P. Long. Said depositions took place on February 23 and 24, 1976, respectively. Certain documents which had not previously been marked as exhibits at the hearing on the plaintiff's application for a preliminary injunction on July 8, 1975 were marked as exhibits 19 for identification through 39 for identification, respectively at the above two depositions. It is hereby stipulated and agreed that the transcripts of those depositions together with the exhibits marked for identification at those depositions may be introduced by either party subject only to the other parties right to object to the materiality or relevance of any such portion of the transcript or any such exhibit. Such exhibits shall retain the exhibit numbers contained thereon.

G. It is hereby stipulated and agreed between the parties that the trial of this action and the issues to be resolved by the Court shall be based exclusively on the contentions as to facts and conclusions of law of the respective parties contained in this pre-trial order. To that extent the contentions as to facts and proposed conclusions of law of the respective parties contained herein shall supersede the issues raised by all prior pleadings.

DORNBUSH MENSCH & MANDELSTAM

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MINUTES OF TRIAL

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Restaurant Associates Industries, Inc., Plaintiff, vs Anheuser-Busch, Inc., Sidney Sherman and Sherman Management, Defendants.	75 Civ. 3018

New York, New York,
September 21, 1976; 2 p.m.
Room 128.

BEFORE:

HON. MILTON POLLACK,
District Judge.

APPEARANCES:

DORNBUSH MENSCH & MANDELSTAM, ESQS.,
Attorneys for plaintiff;
RICHARD J. SCHAEFFER, ESQ., of counsel.

WILLKIE FARR & GALLAGHER, ESQS.,
Attorneys for defendants;
ROBERT J. KHEEL, ESQ., and
PAULA J. MUELLER, ESQ., of counsel.

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(Case called.)

MR. SCHAEFFER: Your Honor presided at the hearing on the preliminary injunction on this matter on July 8, 1975. Since that time the prelinary injunction was denied and the parties have continued discovery and on behalf of the plaintiff, we conducted discovery and depositions of defendant by three of its employees.

For the purposes of this trial, we intend to offer under Rule 65 the testimony taken in the hearing on the preliminary injunction. We will also offer into evidence, the testimony of the examination before trial of James Bickle and Dennis B. Long, two employees of Anheuser-Busch and the corresponding exhibits marked at those depositions.

In addition to that, your Honor, plaintiff has one witness to call, Joseph Kayata.

THECOURT: Put him on the stand.

MR. SCHAEFFER: Shall I give the transcripts of those depositions at this time?

THE COURT: Yes.

MR. SCHAEFFER: If I could just h ave one moment.

THE COURT: Give them to me later. Go right ahead, I am in the middle of another trial.

Have you prepared a summary of those depositions?

MR. SCHAEFFER: We submitted a pre-trial order.

They are not extensive, each is possibly 80 or 90 pages.

THE COURT: Can you summarize them in one paragraph?

MR. SCHAEFFER: Your Honor, I am unable to summarize them in one paragraph. My own view is that the exhibits marked at those depositions have more probative force --

THE COURT: What do they extablish?

MR. SCHAEFFER: Well, your Honor, they establish that Anheuser-Busch never terminated a certain management agreement effectively. It made certain management agreements at December 24, 1973, Anheuser-Busch didn't intend to terminate that management agreement and that, accordingly, Restrauant Associates, the plaintiff in this case, was entitled to its lost profits through December 26, 1975.

THE COURT: All right, the depositions say that the agreement was not terminated.

MR. SCHAEFFER: That is my view of what those depositions in substance say.

THE COURT: If the agreement was terminated, does that end the case?

MR. SCHAEFFER: That certainly ends one aspect of the case, your Honor, with respect to the lost profits which Restaurant Associates had for the period from July 9, 1975 to December 26, 1975. There is another claim with respect to

tampering with a key employee of Restaurant Associates, Sidney Sherman.

THE COURT: What is the legal basis for restricting an employee to take employment anywhere he wants to go?

MR. SCHAEFFER: It is our view that Mr. Sherman had an obligation to us in dealing with is as our agent.

THE COURT: A contractual obligation?

MR. SCHAEFEER: Yes, I would say that it is contractual although they are oral contracts. It was not an employee who was under contract and he was an at will employee,

THE COURT: What inhibits an at will employee from agreeing to go to work for a competitor?

MR. SCHAEFFER: Well, your Honor, it is the circumstances under which Mr. Sherman entered into that agreement to go to work for the competitor.

THE COURT: What case do you rely on?

MR. SCHAEFFER: I have a brief, your Honor and --

THE COURT: What case do you rely on? I know the law generally in this. I had something to do with it twenty-five years ago. To be more accurate, twenty-four years ago.

MR. SCHAEFFER: I know, your Honor.

THE COURT: What case do you rely on?

MR. SCHAEFFER: Your Honor, there are a number of cases that --

THE COURT: Give me one.

MR. SCHAEFFER: A Florida case in the Fifth Circuit, Blackshear Manufacturing Company against Umitter, 48 Fed. 2nd 174.

THE COURT: That case holds what?

MR. SCHAEFFER: Your Honor, I can tell you that the case holds generally -- I prepared a brief on June 3rd and I haven't read the case since.

THE COURT: I think I have the general information and you tell me that case supports you claim to damages?

MR. SCHAEFFER: There is a New York case in which the Court of Appeals found that acts very similar to those engaged in by Mr. Sherman and were not merely acts for new employment but were acts committed while the employee was on the employer's time and intended to and did interfere, in fact, with an existing agreement between the employer and a third party.

THE COURT: That was a case where they found there was a relationship of confidence with the employer.

MR. SCHAEFFER: Well, your Honor, Mr. Sherman was an employee who had a relationship of confidence with reference to Restaurant Associates.

THE COURT: I am talking about confidence in a legal sense, not colloquially. Go ahead with the witness and see

what you have here.

J O S E P H R. K A Y A T A, called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. SCHAEFFER:

Q Mr. Kayata, are you presently employed by the plaintiff, Restaurant Associates Industries, Inc.?

A Yes, I am.

Q What is your position with the plaintiff?

A I am vice president and controller.

Q How long have you been employed by the plaintiff?

A Since 1970.

Q Were you employed as controller, in the capacity of controller, since that date?

A Yes, I was.

Q Will you state what your duties and responsibilities are in your office as controller of Restaurant Associates Industries, Inc.?

A I am the chief accounting officer of the company.

Q Would you be charged with the responsibility of viewing and supervising the preparation of the financial reports for the company?

A Yes, I am.

Q Will you stat e briefly your previous education and

previous business experience prior to Restaurant Associates?

A I am a graduate of Fordham University with a major in accounting.

I worked in public accounting about two and a half years and I worked for Allied Chemical Corp in generally managerial accounting problems for about thirteen years.

Q What was prior to joining the employ of Restaurant Associates?

A That is correct.

Q Mr. Kayata, with respect to the operations of Restaurant Associates and Anhauser-Busch of the Old Swiss House in Tampa Florida, did you supervise the preparation of the financial reports for Restaurant Associates?

A Yes.

Q Were financial reports submitted to Anheuser-Busch in connection with the operation of Restaurant Associates at Busch Gardens?

A Yes, they were.

Q Pursuant to agreement between Restaurant Associates and Anhueser-Busch?

A That is right.

Q Can you describe basically what those statements were and on what basis they were submitted?

A They were periodic statements of profit from

Restaurant Associates' operations, showing sales and related costs.

Q Were these statements sent to Anheuser-Busch during the period that Restaurant Associates was managing the Swiss House?

A Yes, they were.

Q Did you prepare a statement of operations for the last six months period during which Restaurant Associates operated the Old Swiss House as agents for Anheuser-Busch?

A Yes, I did .

Q Is this the summary which you prepared?

A Yes.

MR. SCHAEFFER: I offer that into evidence, the statement of operations prepared by MR. Kayata fro the period from December 29, 1974 to June 28, 1975, as plaintiff's exhibit No. 40.

MR. KHEEL: No objection.

THE COURT: Received.

xxx (Plaintiff's exhibit No. 40 was received in evidence)

Q Mr. Kayata, will you describe what this statement is a summary of?

A This statement puts forth the sales and revenues for the period and food costs, labor costs and other costs relating to those revenues, and it presents the profit from

restaurant operations.

It also delinates percentages relating to each element of cost.

Q Mr. Kayata, with respect to the sales of Restaurant Associates during the period indicated in the statement, was that based upon reports made by the manager of the Old Swiss House?

A Yes.

Q With respect to those reports, that were made by the manager of the Old Swiss House, were they in writing?

A Yes.

Q Are they maintained at 1540 Broadway, the corporate offices of Restaurant Asseciates Industries, Inc.?

A Yes, they are.

Q With respect to the items of expense, was this summary based upon invoices and other documents?

A That is right.

Q Payroll records?

A Correct.

Q And are those documents available at the offices of Restaurant Associates at 1540 Broadway?

A Yes, they are.

Q Mr. Kayata, what does plaintiff's exhibit 40 indicate with respect to the percentag e of profit from restaurant

operations?

A Twenty-three per cent of sales.

Q The profit was equal to twenty-three per cent of gross sales for the period?

A That is right.

Q Were you informed that the gross sales of Sherman Management Corporation, Inc., for the period from July 10, 1975 through December 27, 1975, was equal to $761,496?

A Yes.

Q Based upon that and based upon the records which you have reviewed at Restaurant Associates, did you prepare an estimated statement of operations reflecting what the profit of Restaurant Associates would have been if Restaurant Associates operated the Old Swiss House between July 9 and December 27, 1975?

A Yes, I did.

Q I show you this document and ask you if this is the estimated statement of operations which you prepared?

A Yes, it is.

MR. SCHAEFFER: I offer this exhibit, estimated statement of operations for the period July 9, 1975 to December 27, 1975,as Plaintiff's exhibit No. 41.

THE COURT: Any objection?

MR. KHEEL: Maybe if the witness will tell me what

this purports to be, I may not object.

I have never seen this document.

THE COURT: That is not a grounds of objection.

MR. KHEEL: I object at the present time.

THE COURT: Mark it for identific ation.

xxxx (Plaintiff's exhibit No. 41 marked as an exhibit for identification.)

Q Mr. Kayata, with respect to plaintiff's exhibit 41 for identification, can you explain what this purports to represent?

A It is an estimated statement of operations for the period July 9 to December 27, 1975.

Q How did you prepare that statement?

A We took the sales that were given to us and applied the percentages, the cost percentage and profit percentages that were experienced for the first six months of the year to the sales figures and we adjusted the occupancy costs in accordance with the contract to record additional rents that would have been due on sales in excess of $1,200,000 for the year, and calculated a profit from restaurant operations on that basis.

Q Is the increase in occupancy cost the profit for restaurant operations a 20.8 per cent of gross sales as opposed to 23 per cent of gross sales in the prior period?

A That is right.

MR SCHAEFFER: I offer plaintiff's exhibit 41 for identification into evidence.

MR. KHEEL: I have no objection.

THE COURT: Received.

xxx (Plaintiff's exhibit No. 41 for identification, received in evidence.)

Q Mr. Kayata, based upon the estimated statement of operations that you prepared, in terms of dollars what were the lost profits of Restaurant Associates Industries, Inc., for the period July 9, 1975 to December 27, 1975?

A $158,705.

MR. SCHAEFFER: Thank you, Mr. Kayata.

MR. KHEEL: I have no questions of this witness, your Honor.

BY THE COURT:

Q Mr. Kayata, from your knowledge of the business, was Restaurant Associates subservient and dependant i any way on Anheuser-Busch?

A I don't understand the question, your Honor.

In the aggregate?

Q Yes, in the overall operations.

A The Busch Gardens was a substantial segment of the Restaurant Associates business.

Q Would you say that the Restaurant Associates business on an overall basis was dominated by Anheuser-Busch?

A No, I wouldn't say that.

Q Do you know of any facts to indicate that Anheuser-Busch intended to damage the plaintiff and set out on a course of action to damage plaintiff?

A No, I don't know. I wouldn't know that.

Q Do you have any knowledge as to when Anheuser-Busch began to negotiate with Sherman?

A No.

Q Do you have any knowledge as to when Anheuser-Busch had decided to terminate it relationship with Restaurant Associates?

A No.

THE COURT: Thank you, you may step down.

MR. SCHAEFFER: I would indicate that in answer to some of the questions which you asked Mr. Kayata which he was not able to answer, some of that is in the record of the depositions.

(Witness excused.)

THE COURT: This does not stop me from inquiring of this witness.

MR. SCHAEFFER: I am not suggesting it. I just wanted to tell your Honor what was in there.

That will conclude the testimony of this section of

the case as far as the plaintiff is concerned.

I would like to give your Honor certain documents, namely depositions.

THE COURT: Don't give them to me. If you want them in evidence, go ahead. I don't want any gifts.

MR. SCHAEFFER: I would ask to be marked the deposition of Anheuser-Busch by James Bickle taken by the plaintiff on February 23, 1976.

THE COURT: Any objection to marking it into evidence?

MR. KHEEL: We would like to note for the record a lot of depositions are being offered and purport to show the intent of one of the parties or the other. But I assume you will take them for whatever they are worth, and just note my objection for the record.

THE COURT: What you are probably saying is that they are immaterial. I will take them subject to rulings on relevancy and materiality at the close of the record.

xxx (Plaitiff's exhibit No. 42 for identification received in evidence.)

MR. SCHAEFFER: I would offer the deposition of Dennis P. Long, vice-president of Anheuser-Busch, which deposition was taken on February 24, 1976.

THE COURT: Any objection?

MR. KHEEL: Same objection as before, your Honor.

THE COURT: It will be taken subject to materiality and relevancy.

XXXX (Plaintiff's exhibit No. 43 for identification received in evidence.)

MR. SCHAEFFER: Certain exhibits were marked at those depositions. I supplied your Honor with those exhibits and sent them down with the pre-trial order in this case.

I would ask that those exhibits be deemed in evidence together with the depositions at which they were marked.

THE COURT: Any objection?

MR. KHEEL: Same objection, your Honor.

THE COURT: Taken subject to relevancy and materiality.

MR. SCHAEFFER: I just might inquire as to whether or not your Honor has a copy of the transcript of the hearing on plaintiff's application for a preliminary injunction, which I understand is received as part of the record on this trial, and if the Court does not --

THE COURT: I have the file copy of it. I take it that you are offering that as part of your offering of the evidence, is that right?

MR. SCHAEFFER: Thatis correct, your Honor.

THE COURT: That will be deemed marked plaintiffs exhibit 44.

XXX (Transcript of injunction hearing deemed marked as plaintiff's exhibit No. 44 in evidence.)

THE COURT: Anything else?

MR. SCHAEFEER: Just offer to you at this time plaintiff's reply memorandum of law.

THE COURT: Plaintiff rests?

MR. SCHAEFFER: Plaintiff rests.

MR. KHEEL: Your Honor, I also have a copy of a trial memorandum to give to you and I will rest.

THE COURT: Both sides rest?

MR. SCHAEFFER: Yes, your Honor.

MR. KHEEL: Yes, your Honor.

T HE COURT: Decision reserved.

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PLAINTIFF'S EXHIBIT 4

AGREEMENT DATED OCTOBER 22, 1969 BETWEEN ANHEUSER-BUSCH INCORPORATED AND RESTAURANT ASSOCIATES INDUSTRIES, INC.

AGREEMENT dated October 22, 1969, but commencing as hereinafter set out, between ANHEUSER-BUSCH, INCORPORATED, a Missouri corporation, with principal offices at 721 Pestalozzi Street, St. Louis, Missouri ("Busch"), and RESTAURANT ASSOCIATES INDUSTRIES, INC., a New York corporation, with principal offices at 1540 Broadway, New York ("Associates").

PREAMBLE

Busch is the owner of certain premises known as the Tampa Brewery, located in Tampa, Florida. There are presently located on said premises food and beverage service areas which consist of three restaurants known as Old Swiss House, Rathskeller and Snack Bar, plus areas where vending machines are located and maintained to dispense food and beverages. The foregoing restaurants and vending machine locations are designated on Exhibit A and for convenience are hereinafter collectively referred to as the "Areas Furnished". It is contemplated by the parties hereto that the existing Areas Furnished will be augmented from time to time with additional food and beverage service areas and such areas where food and beverages are to be sold in accordance with the terms of this agreement shall, for the purposes hereof, be deemed included in the definition of Areas Furnished as from time to time such areas are established provided at such times same is mutually agreeable to the parties hereto.

Associates is engaged in the business of managing restaurant and food and beverage service areas and offering consultation services with respect thereto. The parties hereto are desirous of entering into an agreement whereby Associates shall, under the direction and control of Busch, manage the service of food and beverage at the Areas Furnished, and extend to Busch the benefits

of Associates' management and Associates' experience, skill and ability in the restaurant field, upon the terms and conditions herein set forth

NOW THEREFORE, it is agreed:

1. Definitions:

(a) "Commencement Date" shall mean the date on which Associates commences the performance of services hereunder.

(b) "Gross Receipts" shall mean all revenues and income of any kind derived directly or indirectly and actually received from the Areas Furnished, including without limitation, from the sale, whether on a cash basis or on credit, of food, beverages and tobacco, excluding, however, federal, state and municipal excise and sales taxes paid by customers in connection with purchases made by them to the extent that such taxes are separately itemized on customers' bills or checks and gratuities to employees. The term "Gross Receipts" in respect of revenues resulting from the operation of any vending machines shall be limited to the revenues received, collected, or that may be payable to Busch by the Owners of such vending machines pursuant to contracts with such Owners, as distinguished from the gross revenues of such vending machines.

(c) "Equipment" shall mean all the fixtures, equipment and articles of personal property owned by Busch and used solely in connection with the operation of the business conducted at the Areas Furnished, and all repairs, replacements, improvements and additions thereto and substitutions therefor.

(d) "Operating Expenses" shall mean the aggregate of all expenses paid or incurred in connection directly and solely with the business conducted at the Areas Furnished in accordance with the accrual method of

standard restaurant accounting procedures and without limiting the generality of the foregoing, Operating Expenses shall include the cost of:

(i) Wages, salaries, payroll taxes, Social Security taxes and other necessary employee costs, fringe benefits and other usual and customary incidental employee benefits paid to and for employees who are employed directly and solely in connection with the business conducted at the Areas Furnished.

(ii) Cost of food, beverages and tobacco sold in, on or from the Areas Furnished or in such manner that the amounts received therefor would be included in the term "Gross Receipts" as defined in this Agreement.

(iii) Cost of keeping and maintaining the Areas Furnished clean and the cost of repairs and replacements to the Equipment up to the amount of $2,100 per month. Costs of repairs and replacements exceeding $2,100 per month shall be paid by Busch directly and not be deemed to be within Operating Expenses.

(iv) Cost of laundry and linen service and trash removal.

(v) Cost of utilities as set out in Section 9 hereof.

(vi) Cost of various contracts under Section 3(d) hereinafter.

(vii) Cost of Public Relations Firm under the provisions of Section 3(g) hereinafter.

(viii) Miscellaneous expenses incurred in connection with the business conducted at the Areas Furnished, such as for music and entertainment; china, glassware, silverware and utensils; cleaning supplies; paper and guest supplies; sales promotion and advertising; customer expense; office

supplies; armored car service; credit card service; bad debts and dues and subscriptions.

(e) "Net Profit" shall mean the amount by which Gross Receipts exceed Operating Expenses. "Net Deficit" shall mean the amount by which Operating Expenses exceed Gross Receipts.

2. Management

Busch engages Associates to manage and Associates agrees, subject to the terms and conditions hereinafter contained, to manage a food and beverage service ("Business") within the Areas Furnished.

3. Scope of Agreement

Associates shall manage the Business under the direction of Busch and according to the highest standards attainable within the policies, rules and regulations as set forth by Busch. At all times during the operation Busch shall have the right of ultimate over-all control and direction of the premises and of any and all operations thereon. The choice of menu items and prices for the items sold in the Areas Furnished shall be subject to the approval of Busch. Associates shall, in the discharge of its duties hereunder, among other things:

(a) Manage the Business throughout the term of this Agreement to the best of the ability of Associates in accordance with the terms and conditions contained herein and in accordance with all applicable laws and regulations.

(b) Keep the Areas Furnished clean and make any necessary repairs or replacements to the Equipment.

(c) Collect all Gross Receipts and promptly pay or cause to be

paid on behalf of Busch all Operating Expenses incurred in connection with the operation of the Business.

(d) On behalf of Busch negotiate and enter into contracts and take assignment of existing contracts for requisite services and supplies required for the operation of the Business, which contracts, without limiting the generality of the foregoing, may include the following: Collective bargaining agreements, linen supplies, printing materials and rubbish removal.

(e) Maintain in accordance with recognized accounting procedures, during the term of this Agreement and for one year thereafter, separate records and books of account, recording all transactions at or in any way connected with the operation of the Business, which books and records shall, during ordinary business hours, be open to examination for the purposes of an audit of Gross Receipts and Operating Expenses, by Busch or its representatives.

(f) Use its best efforts to make a profit.

(g) Employ on behalf of Busch the public relations firm which is currently employed by Busch for the promotion of Busch Gardens provided the services of such public relations firm are satisfactory and the fee charged for their services is competitive. In no event shall the annual Fee or other costs in regard to such public relations firm or any other public relations firm be more than two (2%) per cent of the annual Gross Receipts.

(h) Correlate the operations of the Business with any special events, promotions or programs conducted by Busch at Busch Gardens.

(i) As of date Associates takes over operation of Old Swiss House and Snack Bar from Interstate United Corporation of Florida, an inventory shall be taken of all food and beverages on hand. Busch under its

contract with Interstate is obligated to purchase said inventory from Interstate at Interstate's actual net invoiced price. Same shall be purchased by Associates from Busch in the same dollar amount and be processed under "Operating Expenses" thereafter.

All other supplies on hand, including but not limited to, china, glassware, tableware, utensils, cleaning supplies, paper supplies, etc. which were charged to the "cost of business" for accounting purposes by Interstate United Corporation of Florida at time of purchase shall be taken over by Associates at no cost to it.

(j) Make all reasonable efforts to collect delinquent accounts. It is understood and agreed, however, that if Associates makes reasonable efforts to collect delinquent accounts and is unsuccessful in such collection, Associates shall not be responsible for loss of Gross Receipts resulting therefrom.

4. Term

(a) The initial term of Associates' appointment as Manager of the Areas Furnished shall commence on the Commencement Date and terminate two (2) years thereafter. For convenience, each such year is hereinafter referred to as a "Term Year". Promptly following the Commencement Date the parties shall execute and deliver an instrument identifying such date.

(b) Either party may, on written notice to the other, not earlier than six (6) months nor later than three (3) months prior to the termination date of this agreement, elect to extend the term of this agreement for an additional term of two (2) years, upon the same terms and conditions contained herein (including without limitation the right to so renew this agreement); and unless the party receiving such notice shall, within thirty

(30) days from the date of receipt thereof notify the party which sent the notice that it rejects such notice to extend, the term of this agreement shall be so extended.

5. Manager's Fee

Busch shall pay to Associates compensation for its services rendered hereunder on a monthly basis in an amount equal to one-half of the Net Net Profit for the month. For purposes hereof, Net Net Profit shall mean the Net Profit for the month after first deducting the sum of $12,500.00 from such monthly Net Profit. In the event that there is no Net Profit for a particular month or in the event that after a deduction of the sum of $12,500.00 from the Net Profit of any particular month there is no Net Profit, Associates shall be entitled to no compensation for that month. The fee as specified herein shall be paid promptly following the submission of the profit and loss statements by Associates to Busch pursuant to Section 7(a) hereof. Assuming Associates commences its services hereunder on a day other than the first day of a month, said sum of $12,500.00 for deduction purposes shall be prorated in the same relation as the number of days left in the month bears to the number of days in such month.

6. Net Profit and Net Deficit

Concurrently with the submission of the profit and loss statements referred to in Section 7(a) Associates agrees to remit to Busch the amount of any Net Profits reflected on said statement, and Busch upon receipt of such statements shall promptly pay to Associates one-half the amount of any Net Net Profits or the full amount of any Net Deficit reflected on said monthly statement, as the case may be.

7. Accounting Reports Required

(a) On or before the expiration of two (2) weeks following the end of each calendar month, Associates shall render a profit and loss statement prepared in accordance with customary restaurant accounting procedures, certified to be accurate by an officer of Associates, covering all operations under this agreement and will reflect Net Profits (or Net Deficit, if any) for such month. Such statements shall include the applicable figures representing the various headings as set out in Exhibit B attached hereto.

(b) Associates will furnish Busch within one (1) week following the close of each week copies of the weekly operating reports that Associates employs for internal control.

8. Undertakings of Busch

Busch agrees to make available to Associates, free of charge, the exclusive commercial use, except for the commercial use of Busch, of the Areas Furnished and the use of the Equipment during the term of this Agreement and Busch agrees that Associates shall peaceably and quietly enjoy the Areas Furnished and the use of the Equipment so long as Associates performs its obligations hereunder.

9. Utilities

and

All telephone charges/utilities which are metered and charged to Associates direct in such quantities as may be required by Associates shall be paid for by them. Busch shall have the right to discontinue temporarily the supply of all or any of the above services when reasonably necessary in m repairs, alterations, changes or improvements in the Areas Furnished or elsewhere. It is understood that charges for such utilities shall be paid by Associates out of revenues received.

10. Governmental Requirements

Associates shall:

(a) Promptly observe and execute the provisions of any and all present and future governmental laws, rules, regulations and other demands pertaining to its activities or occupancy hereunder.

11. Termination

(a) Busch may at any time during the term of this Agreement, upon ten (10) days' written notice to Associates, terminate this Agreement upon the occurrence of any one or more of the following events.

(i) Associates shall become insolvent or shall take the benefit of any present or future insolvency statute, or shall make a general assignment for the benefit of creditors, or file a petition in bankruptcy or a petition or answer seeking an arrangement or its reorganization or the readjustment of its indebtedness under the federal bankruptcy laws or any other law or statute of the United States or of any State thereof, or consent to the appointment of a receiver, trustee, or liquidator of all or substantially all of its property; or

(ii) By order or decree of a court, Associates shall be adjudged bankrupt, or an order shall be made approving a petition filed by any of the creditors or by any of the stockholders of Associates, seeking its reorganization or the readjustment of its indebtedness under the federal bankruptcy laws or under any law or statute of the United States or of any State thereof; or

(iii) A petition under any part of the federal bankruptcy laws or an action under any present or future insolvency law or statute shall

be filed against Associates and shall not be dismissed within thirty (30) days after the filing thereof; or

(iv) By or pursuant to, or under authority of any legislative act, resolution or rule, or any order or decree of any court or governmental board, agency or officer having jurisdiction, a receiver, trustee, or liquidator shall take possession or control of all or substantially all of the property of Associates, and such possession or control shall continue in effect for a period of fifteen (15) days; or

(v) Associates shall be in substantial default in the performance of any of the terms, covenants or conditions hereof to be performed, kept or observed by Associates, which such default Associates shall not have cured within ten (10) days' after receipt of written notice thereof.

(b) No waiver by Busch of any default on the part of Associates in performance of any of the terms, covenants or conditions hereof to be performed, kept or observed by Associates shall be or be construed to be a waiver by Busch of any other or subsequent default in performance of any of the said terms, covenants and conditions.

12. Indemnity, Liability and Insurance

(a) Associates agrees to reimburse Busch from and against any and all expense and loss resulting from damage to property of Busch caused by the act or omission of Associates, its agents, servants and employees.

(b) Busch shall indemnify and hold harmless Associates from all claims and demands of third persons, including but not limited to those for death, personal injury or property damage arising out of the negligence of Busch, its officers, agents, guests, invitees, contractors or other persons doing business with it.

(c) Busch shall procure and obtain for its account, such insurance coverage as necessary with Associates named as co-insured where applicable and shall furnish certification of such insurance to Associates.

13. Casualty Loss

It is expressly understood that, should the premises, or any part thereof, be damaged or destroyed by any cause whatsoever, Busch has the option of rebuilding, repairing or replacing such property as has been damaged or destroyed, or of not rebuilding or replacing same, whichever is deemed more expedient or desirable by Busch, and Busch shall not be responsible to Associates for any damages it may incur from prospective loss of income or otherwise, because of damage to or destruction of the premises.

14. Relationship of the Parties

This agreement creates neither a partnership nor a joint venture.

15. Notices

All notices (including but not limited to designations, notifications and reports) given or required to be given to or by any party shall be in writing and all such notices shall be forwarded by registered or certified mail to the addresses set forth on the first page of this Agreement or to such other addresses as either party may notify the other by certified or registered mail. Notices served as herein provided shall be deemed effective and served as of the date of the certified or registered mailing thereof. Notices to Busch shall be to the attention of Mr. Richard J. Bender, Vice President-Corporate Affairs, or his successor, and to Associates shall be to the attention of Mr. Ralph Tolve, Vice President, or his successor.

16. Assignment

Associates shall not assign, sell, convey, transfer, mortgage

or pledge this Agreement, except to an affiliate of Associates. An affiliate shall be a wholly owned subsidiary of Associates. Such assignment to an affiliate shall be effective only upon submission to Busch of a duplicate original of the instrument of assignment which shall contain a clause under which the assignee shall assume and agree to perform all of the terms, covenants and conditions to be performed by Associates hereunder. Notwithstanding such assignment and assumption, Busch shall have the right to look to the assignor should the assignee fail to perform.

17. Headings

The Section Headings, if any, are inserted herein only for convenience and for reference, and in no way define, limit or otherwise describe the scope or intent of any provision hereof.

18. Amendment and Interpretation

(a) This Agreement may be amended only by an instrument in writing signed by the party against whom enforcement of such amendment may be sought.

(b) This Agreement shall be governed by and interpreted in accordance with the laws of the State of Florida.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and their corporate seals hereto affixed as of the day and year first above written.

Attest:

Corporate Seal

ANHEUSER-BUSCH, INCORPORATED

By

Title Vice Pres - Corporate Affairs

Attest:

Corporate Seal

RESTAURANT ASSOCIATES INDUSTRIES, INC.

By

Title

Plaintiff's Exhibit 4

[For convenience of Court and Counsel this part of the Exhibit is bound in on the opposite page.]

OVERSIZE FOLDOUT(S) FOUND HERE IN
THE PRINTED EDITION OF THIS VOLUME
ARE FOUND FOLLOWING THE LAST PAGE
OF TEXT IN THIS MICROFICHE EDITION

SEE FOLDOUT NO 1

A 417

PLAINTIFF'S EXHIBIT 5

AGREEMENT DATED DECEMBER 8, 1972 BETWEEN ANHEUSER-BUSCH INCORPORATED AND RESTAURANT ASSOCIATES INDUSTRIES, INC.

AGREEMENT dated December 8, 1972, but commencing as hereinafter set out between ANHEUSER-BUSCH, INCORPORATED, a Missouri corporation, with principal offices at 721 Pestalozzi Street, St. Louis, Missouri ("Busch"), and RESTAURANT ASSOCIATES INDUSTRIES, INC., a Delaware corporation, with principal offices at 1540 Broadway, New York ("Associates").

PREAMBLE

Busch is the owner of certain premises known as the Busch Gardens, located adjacent to its brewery in Tampa, Florida. There are presently located on said premises food and beverage service areas which consist of a restaurant known as The Old Swiss House, three snack bars, two juice bars, a pretzel stand, and various food carts. The foregoing restaurant, snack bars, juice bars, pretzel stand and food carts are, for convenience, hereinafter collectively referred to as the "Areas Furnished". It is contemplated by the parties hereto that the existing Areas Furnished may be augmented from time to time with additional food and beverage service areas including areas where vending machines will be located and maintained to dispense food and beverages and such areas where food and beverages are to be sold in accordance with the terms of this agreement shall, for the purposes hereof, be deemed included in the definition of Areas Furnished as from time to time such areas are established provided at such times same is mutually agreeable to the parties hereto.

INITIAL

Associates is engaged in the business of managing restaurant and food and beverage service areas and offering consultation services with respect thereto. The parties hereto are desirous of entering into an agreement whereby Associates shall, under the direction and control of Busch, manage the service of food and beverage at the Areas Furnished, and extend to Busch the benefits of Associates'

management and Associates' experience, skill and ability in the restaurant field, upon the terms and conditions herein set forth.

NOW THEREFORE, it is agreed:

1. Definitions:

(a) "Commencement Date" shall be the 26th day of December, 1971.

(b) "Gross Receipts" shall mean all revenues and income of any kind derived directly or indirectly and actually received from the Areas Furnished, including without limitation, from the sale, whether on a cash basis or on credit, of food, beverages and tobacco, excluding, however, federal, state and municipal excise and sales taxes and gratuities to employees paid by customers in connection with purchases made by them. The term "Gross Receipts" in respect of revenues resulting from the operation of any vending machines owned and installed in the future by Associates for public use shall be all revenues received from the machines; however, in the event such machines are owned by persons other than Associates, the term "Gross Receipts" in respect to such machines shall be limited to the revenues received, collected, or that may be payable to Associates by such owners pursuant to contracts with said owners.

(c) "Equipment" shall mean all fixtures, equipment and articles of personal property owned and furnished by Busch and used solely in connection with the operation of the Business conducted at the Areas Furnished, and all replacements therefor.

(d) "Operating Expenses" shall mean the aggregate of all expenses paid or incurred in connection directly and solely with the business conducted at the Areas Furnished in accordance with the accrual method of standard restaurant accounting procedures and without limiting the generality of the foregoing, Operating Expenses shall include the cost:

(i) Wages, salaries, payroll taxes, Social Security taxes and other

necessary employee costs, fringe benefits and other usual and customary incidental employee benefits paid to and for employees who are employed directly and exclusively in connection with the business conducted at the Areas Furnished.

(ii) Cost of food, beverages and tobacco sold in, on or from the Areas Furnished or in such manner that the amounts received therefor would be included in the term "Gross Receipts" as defined in this agreement.

(iii) Subject to the provisions of section 3(b) and section 7, cost of all maintenance, replacement and repair items are to be borne either by Busch Gardens or charged to the operation of the food and beverage facilities. Those to be borne directly by Busch Gardens are as follows:

INITIAL

(a) Exteriors of all food and beverage facilities in Areas Furnished.

(b) All capital expenditures. Determination as to what is and what is not a capital expenditure is to be made by Busch Gardens management.

(c) All work performed by Anheuser-Busch, Inc. brewery employees.

Costs of maintenance and repair work to be charged against food and beverages operations are as follows:

(d) All cleaning of Areas Furnished and areas referred to in Section 3(b)(iv). INITIAL

(e) Repair and replacement to all interiors of facilities within Areas Furnished, excluding capital expenditures, subject to subparagraph (j) hereof. INITIAL

(f) All repair and replacement of food carts and equipment not involving a capital expenditure.

(g) Salaries of three (3) maintenance men.

(h) Laundry, linen service and trash removal.

(i) Cost of all utilities in furnished areas.

(j) All costs in connection with the following shall be charged directly to operations, provided the total amount does not exceed $30,000 annually. All costs in excess of $30,000 annually in this category shall be borne directly by Busch Gardens:

(1) Materials required for repair and replacement in connection with work performed by Restaurant Associates' maintenance employees.

(2) Labor and material costs in connection with outside contractors and maintenance and repair of interiors and equipment in furnished areas.

(3) Service contracts in connection with furnished areas.

(iv) Miscellaneous expenses incurred in connection with the business conducted at the Areas Furnished, such as china, glassware, silverware and utensils; cleaning supplies; paper and guest supplies; sales promotion, public relations and advertising; customer expense, office supplies; armored car service; credit card service; bad debts and dues and subscriptions.

(v) Percentage Payments to Busch equal in amount to the sum of (1) with respect to the Business conducted in The Old Swiss House, two and one-half per cent (2-1/2%) of the aggregate daily Gross Receipts therefrom until such Gross Receipts on an accumulative basis for the respective Term Year shall equal $1,200,000 and, thereafter, five per cent (5%) of such aggregate daily Gross Receipts in excess of $1,200,000, plus (2) with respect to the Business at the snack bars, juice bars, pretzel stand, food carts and all other food and beverage opera-

tions excluding (1) above, (a) for the Term Year commencing December 26, 1971, thirty-five per cent (35%) of the aggregate daily Gross Receipts therefrom and (b) for the Term Year commencing December 26, 1972 and for each Term Year thereafter, forty per cent (40%) of the aggregate daily Gross Receipts therefrom.

(e) "Net Profit" shall mean the amount by which Gross Receipts exceed Operating Expenses. "Net Deficit" shall mean the amount by which Operating Expenses exceed Gross Receipts.

(f) "Business" shall mean the food and beverage services within the Areas Furnished.

2. Management:

Busch engages Associates to manage as its agent and Associates agrees, subject to the terms and conditions hereinafter contained, to manage the Business.

3. Scope of Agreement:

Associates shall manage the Business as the agent under the direction of Busch and according to the highest standards attainable within the policies, rules and regulations as set forth by Busch. At all times during the operation, Busch shall have the right of ultimate over-all control and direction of the premises and of any and all operations thereon. The choice of menu items and prices for the items sold in the Areas Furnished shall be subject to the approval of Busch. All food and beverage facilities in all Areas Furnished under the terms of this contract are the property of Busch. Therefore, all repairs and maintenance shall be performed at the direction of Busch. Associates shall during the term of this agreement, in the discharge of its duties hereunder, among other things:

(a) Manage the Business throughout the term of this agreement to the best of the ability of Associates in accordance with the terms and conditions herein and in accordance with all applicable laws and regulations.

(b) With the exception of cases involving an emergency, Restaurant Associates shall prepare a weekly list of repair and maintenance items and shall submit requests for work to be performed to the General Manager of Busch Gardens, Tampa. The General Manager will then determine if the work is to be accomplished and the proper method of performing the work as follows:

(i) Work to be performed by Restaurant Associates maintenance men.

(ii) Work to be performed by outside contractor.

(iii) Work to be performed by Busch brewery personnel.

Unless otherwise assigned Restaurant Associates shall provide the following maintenance and repair services:

(iv) Keep the Areas Furnished clean and in compliance with government safety and health laws, rules and regulations. Keep the area outside of The Old Swiss House to the Monorail Plaza area and to the sidewalk in front of the main stairway clean and free from trash, paper and debris.

(v) Make all necessary repairs to and replacements of the Equipment and the Food Carts that are not capital expenditures.

(vi) Make all necessary repairs and replacements and perform all maintenance that is not under the brewery's jurisdiction to the interiors of the snack bars, juice bars and pretzel stand.

(vii) Associates shall employ three maintenance men used exclusively in connection with the Business.

(viii) Make all necessary repairs and replacements and perform all maintenance to the interior of the Areas Furnished which can be performed by the maintenance men regardless of the total costs of the repair. In the event any repair, replacement or maintenance item cannot be performed by the maintenance men employed by Associates, as provided above, Associates shall notify the General

Manager and Busch shall have the repair, replacement or maintenance item performed at its discretion.

The cost of maintenance, replacement and repair shall be allocated in accordance with section 1(d).

INITIAL

(c) Collect all Gross Receipts and promptly pay or cause to be paid on behalf of Busch all Operating Expenses incurred in connection with the operation of the Business.

(d) On behalf of Busch negotiate and enter into contracts required for the operation of the Business during the term of this agreement. In no case shall any contract have a term which exceeds the initial term of this agreement unless Busch gives prior written approval for any such longer term.

(e) Maintain in accordance with recognized restaurant accounting procedures, during the term of this agreement and for one year thereafter, separate records and books of account, recording all transactions at or in any way connected with the operation of the Business, which books and records shall, during ordinary business hours, be open to examination for the purposes of an audit of Gross Receipts and Operating Expenses, by Busch or its representatives.

(f) Use its best efforts to make a profit.

(g) Correlate the operations of the Business with any special events, promotions or programs conducted by Busch at Busch Gardens.

(h) At the time of termination of this agreement, an inventory shall be taken of all food, beverages and all other supplies on hand, including but not limited to, china, glassware, tableware, utensils, cleaning supplies and paper supplies. Same shall be purchased by Busch from Associates at the actual net invoiced price.

4. Term:

(a) The initial term of Associates' appointment as Manager of the Areas

Furnished shall commence on the Commencement Date and terminate two (2) years thereafter. For convenience, each year of this agreement is herein referred to as a "Term Year".

(b) This agreement shall be automatically renewed for additional term of one (1) year, upon the same terms and conditions contained herein (including without limitation this automatic renewal provision), without further written instrument between the parties, unless either party shall give written notice to the other not less than ninety (90) days prior to the expiration of the initial term or additional term that the agreement shall terminate at the end of the initial term or additional term.

5. Manager's Fee:

For its services rendered hereunder, Associates shall retain the Net Profit for each Term Year hereunder. In the event that the results of operations of any Term Year shall result in a Net Deficit, Associates shall submit to Busch a profit and loss statement for such Term Year showing such Net Deficit. The profit and loss statement shall be certified accurate by a Certified Public Accountant and shall be subject to review by Busch's auditing department. Busch will reimburse Restaurant Associates the amount of Net Deficit not later than 90 days following the review of the audit by Busch. Busch shall complete the review of the audit within 30 days.

6. Accounting Reports Required and Payment of Percentage Payment:

(a) On or before the expiration of three (3) weeks following the end of each of Associates' accounting months, and on or before three (3) weeks following the termination or expiration of this agreement, Busch shall render to Associates a Gross Receipts' statement covering all operations under this agreement setting forth the Gross Receipts for the previous month and accumulatively from the beginning of

the Term Year for The Old Swiss House Restaurant, snack bars, juice bars, pretzel stand, food carts and other food and beverage operations and the amount of the Percentage Payment due from Associates for such month. Each Term Year and any fractional Term Year shall be independent and separate from any other period for the purposes of determining the Percentage Payment payable hereunder. Upon receipt of Busch's statement, Associates shall pay to Busch the monthly Percentage Payment payable in accordance with such statements as an Operating Expense.

(b) Associates will furnish Busch on each following operating day with a report of the previous day's Gross Receipts.

(c) Associates will furnish Busch, at the end of each of its accounting months, a profit and loss statement for the previous month and accumulatively from the beginning of the Term Year.

7. Undertakings of Busch:

(a) Busch agrees to make available to Associates, free of charge, the use of the Areas Furnished and the use of the Equipment during the term of this agreement, and Busch agrees that Associates shall peaceably and quietly enjoy the Areas Furnished and the use of the Equipment subject to the provisions of this agreement so long as Associates performs its obligations hereunder. Busch covenants and agrees not to operate or manage, or cause or permit, directly or indirectly, the operation or management of any food and beverage service operation on the premises of the Busch Gardens except as expressly provided below. Busch presently owns or rents various vending machines dispensing food and beverage to the visiting public within the Gardens. The revenue from these machines is received by Busch directly. Busch shall continue to operate these machines and receive the revenue directly. Busch shall not have the right to relocate the machines/nor change the categories of items therein in the public areas and

INITIAL

such number of vending machines operated by Busch shall not be increased except by agreement of the parties.

(b) Busch shall make all repairs and replacements and perform all maintenance on (1) the exteriors of the Areas Furnished, (2) the Equipment and the Food Carts which are capital expenditures and (3) the interiors of the snack bars, juice bars and pretzel stand where such work is under the brewery's jurisdiction. Such costs shall not be included in Operating Expenses.

(c) Busch shall maintain, repair and replace the flags in front of The Old Swiss House. Such costs shall not be included in Operating Expenses.

8. Utilities:

Busch shall have the right to temporarily discontinue the supply of all or any of the utilities services when reasonably necessary in making repairs, alterations, changes or improvements in the Areas Furnished or elsewhere.

9. Governmental Requirements:

Associates shall promptly observe and execute the provisions of any and present and future governmental laws, rules, regulations and other demands pertaining to its activities or occupancy hereunder.

10. Termination:

(a) Busch may at any time during the term of this agreement, upon ten (10) days' written notice to Associates, terminate this agreement upon the occurrence of any one or more of the following events:

(i) Associates shall become insolvent, take the benefit of any present or future insolvency statute, make a general assignment for the benefit of creditors, file a petition in bankruptcy or a petition or answer seeking an arrangement, reorganization, or the readjustment of its indebtedness under the federal bankruptcy

laws or any other similar federal or state law, or consent to the appointment of a receiver, trustee, or liquidator of all or substantially all of its property; or

(ii) Associates shall be adjudged bankrupt, an order shall be made approving a petition filed by any of the creditors or by any of the stockholders of Associates, seeking its reorganization or the readjustment of its indebtedness under the federal bankruptcy laws or any similar federal or state law; or

(iii) A petition under any part of the federal bankruptcy laws or an action under any present or future insolvency law or statute shall be filed against Associates and shall not be finally and fully dismissed within thirty (30) days after the filing thereof; or

(iv) An order or decree be entered by any court or governmental board, agency or officer having jurisdiction by which a receiver, trustee or liquidator shall take possession or control of all or substantially all of the property of Associates, and such possession or control shall continue in effect for a period of fifteen (15) days; or

(v) Associates shall be in default in the performance of any of the terms, covenants or conditions hereof to be performed, kept or observed by Associates, which such default Associates shall not have cured within ten (10) days after receipt of written notice thereof, or in the event such default is not capable of being cured within such ten-day period, which said default Associates shall not have commenced steps to cure within said period and thereafter diligently pursued same to completion.

(b) No waiver by Busch of any default on the part of Associates in performance of any of the terms, covenants or conditions hereof to be performed, kept or observed by Associates shall be or be construed to be a waiver by Busch of any other

or subsequent default in performance of any of the said terms, covenants and conditions.

(c) Busch shall have the right to temporarily close to the public the Busch Gardens or any part thereof including the Areas Furnished for any cause whatsoever.

(d) In the event the performance of this agreement by either party is prevented by laws, rules or regulations of any governmental body or agency, this agreement shall terminate.

11. Indemnity, Liability and Insurance:

(a) Associates agrees to reimburse Busch from and against any and all expense and loss resulting from damage to property of Busch caused by the act or omission of Associates, its agents, servants and employees.

(b) Busch shall indemnify and hold harmless Associates from all claims and demands of third persons, including but not limited to those for death, personal injury or property damage arising out of the negligence of Busch, its officers, agents, guests, invitees, contractors or other persons doing business with it.

(c) Busch shall procure and obtain for its account, such insurance coverage as necessary with Associates named as co-insured where applicable and shall furnish certification of such insurance to Associates.

(d) Associates shall indemnify and hold harmless Busch from all claims and demands of third persons, including but not limited to those for death, personal injury or property damage arising out of the negligence of Associates, its officers, agents and employees.

12. Casualty Loss:

It is expressly understood that, should the Areas Furnished, or any part thereof, be damaged or destroyed by any cause whatsoever, Busch has the option of rebuilding, repairing, or replacing such property as has been damaged or destroyed, or of not

rebuilding or replacing same, whichever is deemed more expedient or desirable by Busch, and Busch shall not be responsible to Associates for any damages it may incur from prospective loss of income or otherwise, because of damage to or destruction of the premises.

13. Relationship of the Parties:

This agreement is intended to create a principal/agent relationship and is not intended to create a partnership or a joint venture.

14. Notices:

All notices (including but not limited to designations, notifications and reports) given or required to be given to or by any party shall be in writing and all such notices shall be forwarded by registered or certified mail to the addresses set forth on the first page of this agreement or to such other addresses as either party may notify the other by certified or registered mail. Notices served as herein provided shall be deemed effective and served as of the date of the certified or registered mailing thereof. Notices to Busch shall be to the attention of Mr. ~~Richard J. Bender~~ Dennis P. Long, Vice President-Corporate Affairs, or his successor, and to Associates shall be to the attention of Mr. Ralph Tolve, Vice President, or his successor.

INITIAL

15. Assignment:

Associates shall not assign, sell, convey, transfer, mortgage or pledge this agreement, except to an affiliate of Associates. An affiliate shall be a wholly owned subsidiary of Associates. Such assignment to an affiliate shall be effective only upon submission to Busch of a duplicate original of the instrument of assignment which shall contain a clause under which the assignee shall assume and agree to perform all of the terms, covenants and conditions to be performed by

Associates hereunder. Notwithstanding such assignment and assumption, Busch shall have the right to look to the assignor should the assignee fail to perform.

16. Headings:

The Section Headings, if any, are inserted herein only for convenience and for reference, and in no way define, limit or otherwise describe the scope or intent of any provision hereof.

17. Amendment and Interpretation:

(a) This agreement may be amended only by an instrument in writing signed by the party against whom enforcement of such amendment may be sought.

(b) This agreement shall be governed by and interpreted in accordance with the laws of the State of Florida.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed and their corporate seals hereto affixed as of the day and year first above written.

Attest:

_____
(Assistant) Secretary

ANHEUSER-BUSCH, INCORPORATED

By [signature]

Title Vice-President

Attest:

[signature]

RESTAURANT ASSOCIATES INDUSTRIES, INC.

By [signature]

Title Vice-President

A 431

PLAINTIFF'S EXHIBIT 6

LETTER DATED SEPTEMBER 18, 1974 FROM JAMES R. BICKLE TO MR. RALPH TOLVE TOGETHER WITH FOURTEEN (14) PAGE PROPOSED DRAFT OF AN AGREEMENT BETWEEN ANHEUSER-BUSCH INCORPORATED AND RESTAURANT ASSOCIATES INDUSTRIES, INC.

September 18, 1974

Mr. Ralph Tolve
Restaurant Associates Industries, Inc.
1540 Broadway
New York, New York 10036

Dear Ralph:

Enclosed please find a draft copy of the proposed new operating contract for the Old Swiss House. I will be out of the country until October 14, but in the meantime perhaps you can run this through your Legal Department and make any comments you feel necessary and then return this to me for finalization.

Yours truly,

James R. Bickle
Manager
Merchandise & Food Operations

JRB:DV
Enclosure

cc: Messrs. W. H. Thurman
J. W. Gillespie

Keep America Beautiful

A 432

Plaintiff's Exhibit 6

THIS AGREEMENT dated _____, 1974, but commencing as hereinafter set out, is between ANHEUSER-BUSCH, INCORPORATED, a Missouri corporation, with principal offices at 721 Pestalozzi Street, St. Louis, Missouri ("Busch"), and RESTAURANT ASSOCIATES INDUSTRIES, INC., a Delaware corporation, with principal offices at 1540 Broadway, New York, New York ("Associates").

PREAMBLE

Busch is the owner of certain premises in Tampa, Florida known as Busch Gardens, upon which premises is located a restaurant known as The Old Swiss House, ("The Restaurant"). Associates is engaged in the business of managing restaurant and food and beverage operations and of offering consultation services with respect thereto. Busch is desirous of employing Associates to act as its agent in managing the food and beverage operations at The Restaurant, and Associates is desirous of providing such service.

NOW, THEREFORE, it is agreed that:

I. DEFINITIONS

When used throughout this Agreement, the following terms shall have the meanings indicated:

(a) "Equipment" shall mean all fixtures, machinery, tools, equipment and articles of personal property owned and furnished by Busch and used solely in connection with the operation of the food and beverage service conducted at The Restaurant, and all replacements therefor.

(b) "Net Profit" shall mean the amount by which Gross Receipts exceed Operating Expenses. "Net Deficit" shall mean the amount by which Operating Expenses exceed Gross Receipts.

(c) "Gross Receipts" shall mean all revenues and income of any kind derived directly or indirectly and actually received from the food and beverage service at The Restaurant, including without limitation, from the sale, whether on a cash or credit basis, of food, beverages and tobacco, excluding, however, federal, state and municipal excise and sales taxes and excluding gratuities to employees paid by customers in connection with purchases made by them.

(d) "Operating Expenses" shall mean the aggregate of all expenses paid or incurred in connection directly and exclusively with the business conducted at The Restaurant in accordance with the accrual method of standard accounting procedures. Without limiting the generality of the foregoing, Operating Expenses shall include the cost of:

(i) Wages, salaries, payroll taxes, Social Security taxes, fringe benefits and other usual and customary incidental employee benefits paid to and for employees who are employed directly and exclusively in connection with the business conducted at The Restaurant.

(ii) Cost of food, beverages and tobacco sold in, on or from The Restaurant.

(iii) Maintenance costs, the payment for which Associates is obligated under the provisions of paragraph VI. (d) hereof.

(iv) Miscellaneous expenses incurred in providing the business conducted at The Restaurant with such items as china, glassware, silverware, utensils, cleaning supplies, paper supplies, sales promotion, public relations and advertising, office supplies, armored car service, credit card service, bad debts expense, dues, subscriptions, laundry and similar items routinely incurred in the day-to-day affairs of The Restaurant.

(v) All payments made to Busch based on a percentage of the aggregate daily Gross Receipts as required by paragraph III. (a)(1)(7) hereof.

II. PURPOSE AND SCOPE OF AGREEMENT

(a) Busch engages Associates to serve as Busch's agent in the management and operation of the food and beverage services at The Restaurant under the terms and conditions hereinafter contained. Associates, subject to the terms and conditions hereinafter contained, agrees to serve as Busch's agent to that extent. This Agreement is intended to create a principal/agent relationship between the parties and is not intended to create a partnership or a joint venture, or to employ Associates as an independent contractor.

(b) Associates shall manage The Restaurant as the agent for and under the direction of Busch, according to the highest standards of performance and judgment attainable within the policies, rules and regulations set forth by Busch and imposed by law. At all times during Associates' performance hereunder, Busch shall have the right to oversee, control and direct any and all operations of The Restaurant. Without limiting the generality of the foregoing, the

choice of menu items and prices for such items sold in The Restaurant shall be subject to the prior approval of Busch. All advertising and promotional activities shall likewise be subject to the prior approval of Busch. Busch has the right to inspect and examine Associates' operation of the service and to require reasonable corrective measures for what Busch deems to be substandard performance. All repairs and maintenance shall be performed at the direction of Busch.

III. UNDERTAKINGS OF ASSOCIATES

(a) Associates shall during the term of this Agreement, in the discharge of its duties hereunder, among other things:

(i) Manage food and beverage service at The Restaurant to the best of its ability in accordance with the terms and conditions herein and in accordance with all applicable governmental laws and regulations. In this regard, Associates shall, among other things and without limiting the generality of the foregoing:

(1) Collect all Gross Receipts and promptly pay or cause to be paid on behalf of Busch all Operating Expenses incurred in connection with the operation of The Restaurant.

(2) On behalf of Busch, negotiate and enter into contracts required for the operation of The Restaurant during the term of this Agreement. In no case shall any contract have a term which exceeds the initial term of this Agreement unless Busch gives prior written approval for any such longer term.

(3) Maintain in accordance with recognized accounting procedures, for so long as this Agreement is in force and for one year thereafter, separate records and books of account, recording all

transactions at or in any way connected with the operation of The Restaurant including invoices and purchase orders, which books and records shall, during ordinary business hours, be open to examination for the purposes of an audit of Gross Receipts and Operating Expenses, by Busch or its representatives. Associates agrees to cooperate in any such examination or inspection.

(4) Use its best efforts to make a profit.

(5) Correlate the operations of The Restaura[illegible] any special events, promotions or programs conducted by [illegible] Busch Gardens.

(6) Employ on a full-time basis, three (3) maintenance men to do minor maintenance necessary to the routine operation of The Restaurant and to perform routine cleaning tasks.

(7) Make payment to Busch sums equal in amount to two and one-half percent (2-1/2%) of the aggregate daily Gross Receipts therefrom until such Gross Receipts on a cumulative basis for the respective Term Year shall equal $1,200,000 and, thereafter, make payment of five percent (5%) of such aggregate daily Gross Receipts as exceed $1,200,000. Each Term Year and any fractional Term Year shall be independent and separate from any other period for the purposes of determining the amount payable hereunder.

On each following operating day, Associates will furnish to Busch a report of the Gross Receipts from the previous day.

Within three (3) weeks following the end of each month, and within three (3) weeks following the termination

or expiration of this Agreement, Associates shall render to Busch a statement covering all operations performed hereunder. Such statements will include (i) a total of the Gross Receipts both for the previous month and for the cumulative period to date from the beginning of the Term Year, (ii) a total of the operating expenses both for the previous month and for the cumulative period to date from the beginning of the Term Year, (iii) the percentage payment due Busch from Associates for the previous month, and (iv) a profit and loss statement for The Restaurant both for the previous month and for the cumulative period to date from the beginning of the Term Year.

The profit and loss statement shall be certified accurate by a Certified Public Accountant and shall be subject to audit by Busch, which audit must be performed within a reasonable period of time.

Associates will remit the monthly percentage payment then due for the previous month together with the monthly statement. Acceptance of the payment by Busch shall not be construed as Busch's concurrence in the validity of the statement presented, nor as a waiver of any right which Busch may have to seek further payment from Associates.

(b) Associates shall prepare a weekly list of repair and maintenance items and shall submit requests for work to be performed to the General Manager of Busch Gardens, Tampa. However, in emergency situations Associates may, as Busch's agent, proceed as circumstances warrant.

(c) Associates will provide the maintenance work for which it is made responsible by the provisions of paragraph VI. (d).

(d) All property and Equipment provided by Busch hereunder shall remain the property of Busch and Associates shall not sell, lease, pledge or otherwise encumber the Equipment.

IV. UNDERTAKINGS OF BUSCH

(a) Busch agrees to make available to Associates, free of charge, the use of The Restaurant and the use of the Equipment therein during the term of this Agreement, and Busch agrees that Associates shall peaceably and quietly enjoy the use of The Restaurant and the use of the Equipment therein subject to the provisions of this Agreement for so long as Associates performs its obligations hereunder.

(b) Busch shall make all repairs and replacements and perform all maintenance for which Busch is obligated by the provisions of paragraph VI. (c) hereof.

(c) Busch shall maintain, repair and replace the flags in front of The Restaurant. Such costs shall not be included in Operating Expenses.

V. AGENT'S COMMISSION

For the services rendered hereunder, Associates shall retain the Net Profit for each Term Year. In the event that the management of The Restaurant for any Term Year shall result in a Net Deficit for that year, Busch will reimburse Associates the amount of the Net Deficit within ninety (90) days following completion of the audit of The Restaurant profit and loss statement by Busch as set forth in paragraph III. (a)(1)(7) above.

VI. MAINTENANCE

(a) Pursuant to the provisions of paragraph III. (b), Associates shall notify Busch of any and all necessary maintenance, repair or replacement work. The General Manager of Busch Gardens will then determine whether the work is to be performed and, if so, the proper party to perform. All maintenance, repair or replacement work will be done by either (i) maintenance men retained by Associates pursuant to the terms of paragraph III. (a)(i)(6) hereof, (ii) independent contractor(s), or (iii) Busch personnel.

(b) The cost of all maintenance (janitorial or otherwise), replacement and repair items is either to be borne by Busch or to be included in Operating Expenses. It is the general intent of the parties that Busch will bear the expense of major maintenance work, including repair and replacement of capital equipment, and that minor or routine maintenance and cleaning costs will be charged to Operating Expenses.

(c) Without limiting the generality of the foregoing, those items to be borne directly by Busch include:

(i) The cost of maintaining the exterior of The Restaurant.

(ii) All direct and indirect labor charges or expenses related to maintenance, repair or replacement work performed in or on The Restaurant or Equipment by Busch personnel.

(iii) The cost of all materials, supplies, parts and the like required for the repair, replacement or maintenance of Equipment and/or facilities within, or a part of, The Restaurant.

(iv) All labor and material costs incurred in connection with the utilization of outside contractors to perform repair and/or maintenance work in The Restaurant.

(d) Without limiting the generality of the foregoing, items which are to be charged as Operating Expenses include:

(i) All costs of labor, materials, supplies and the like incurred for the cleaning of The Restaurant.

(ii) All direct and indirect labor charges or expenses related to the three (3) maintenance men employed by Associates pursuant to the provisions of paragraph III. (a)(i)(6) to repair and maintain the Equipment and/or facilities within, or a part of, The Restaurant.

(iii) The cost of all laundry and linen service and trash removal.

(iv) The cost of all utilities provided to The Restaurant.

VII. TERM

(a) The initial term of Associates' appointment as agent to manage The Restaurant shall commence on November 5, 1974 and terminate two (2) years thereafter. For purposes of this Agreement, "Term Year" shall mean the period beginning on November 5 through and including the following November 4.

(b) This Agreement shall be automatically renewed for additional terms of one (1) year, upon the same terms and conditions contained herein (including without limitation this automatic renewal provision), or as later amended, without further written instrument between the

parties, unless either party shall give written notice to the other not less than ninety (90) days prior to the expiration of the initial term or any additional term that the Agreement shall terminate at the end of the initial term or the additional term.

VIII. UTILITIES

Busch shall have the right to termporarily discontinue the supply of all or any of the utilities services when reasonably necessary in making repairs, alterations, changes or improvements in The Restaurant or elsewhere.

IX. GOVERNMENTAL REQUIREMENTS

Associates shall observe and promptly execute the provisions of any and all present and future governmental laws, rules, regulations and other demands pertaining to its activities or occupancy hereunder.

X. TERMINATION

(a) Busch may at any time during the term of this Agreement, upon ten (10) days' written notice to Associates, terminate this Agreement upon the occurrence of any one or more of the following events:

(1) Associates shall become insolvent, take the benefit of any present or future insolvency statute, make a general assignment for the benefit of creditors, file a petition in bankruptcy or a petition or answer seeking an arrangement, reorganization or the readjustment of its indebtedness under the federal bankruptcy laws or any other similar federal or state law, be adjudged a bankrupt or consent to the appointment of a receiver, trustee, or liquidator of all or substantially all of its property; or

(ii) Associates shall be in default in the performance of any of the terms, covenants or conditions hereof to be performed, kept or observed by Associates, which such default Associates shall not have cured within ten (10) days after receipt of written notice thereof, or in the event such default is not capable of being cured within such ten-day period, which said default Associates shall not have commenced steps to cure within said period and thereafter diligently pursued same to completion.

(b) No waiver by Busch of any default on the part of Associates in performance of any of the terms, covenants or conditions hereof to be performed, kept or observed by Associates shall be or shall be construed to be a waiver by Busch of any other or subsequent default in performance of any of the said terms, covenants and conditions.

(c) Busch shall have the right to temporarily close to the public the Busch Gardens or any part thereof, including The Restaurant for any cause whatsoever; provided, however, that if The Restaurant is closed by Busch for a period of more than three consecutive days, Busch will reimburse Associates for substantiated fixed labor costs (excluding prescheduled vacations) which Associates incurs with respect to its employees regularly employed in The Restaurant who cannot economically be transferred by Associates to a productive capacity elsewhere. This obligation for reimbursement shall extend only from the 4th consecutive day of such closing through the 10th consecutive day regardless of the ultimate length of such continuous closing. Busch also agrees to give Associates at least thirty (30) days' prior written notice if Busch plans modifications to all or

a portion of the Busch Gardens which will require closing The Restaurant.

(d) In the event the performance of this Agreement by either party is prevented by laws, rules or regulations of any governmental body or agency, this Agreement shall terminate.

(e) At the time of termination of this Agreement, an inventory shall be taken of all food, beverages and all other supplies on hand, including but not limited to, china, glassware, tableware, utensils, cleaning supplies and paper supplies, all of which shall be purchased by Busch from Associates at the actual net invoiced price.

XI. INDEMNITY, LIABILITY AND INSURANCE

(a) Associates agrees to indemnify and hold Busch harmless from and against any and all cost or expense resulting from a claim, settlement, suit or action for personal injury (including death) or property damage suffered by any person, corporation or organization whatsoever, where such personal injury or property damage arose out of the negligent act or omission of Associates, its officer(s), agent(s), employee(s), invitee(s), contractor(s) or others doing business with it.

(b) Busch agrees to indemnify and hold Associates harmless from and against any and all cost or expense resulting from a claim, settlement, suit or action for personal injury (including death) or property damage suffered by any person, corporation or organization whatsoever, where such personal injury or property damage arose out of the negligent act or omission of Busch, its

officer(s), agent(s), employee(s), invitee(s), contractor(s) or others doing business with it.

(c) Busch shall procure and obtain for its account such insurance coverage as necessary with Associates named as co-insured where applicable and Busch shall furnish a certificate of such insurance to Associates upon request.

(d) Associates shall indemnify and hold Busch harmless from and against any and all loss, cost or expense of all claims, demands, suits or settlements arising out of or resulting from any contract entered into by Associates on behalf of Busch, where the authority to enter into such a contract is not herein conferred on Associates.

XII. CASUALTY LOSS

It is expressly understood that should The Restaurant, or any part thereof, be damaged or destroyed by any cause whatsoever, Busch has the option of rebuilding, repairing, or replacing such property as has been damaged or destroyed, or of not rebuilding or replacing same, whichever is deemed more expedient or desirable by Busch, and Busch shall not be responsible to Associates for any damages it may incur from prospective loss of income or otherwise.

XIII. NOTICES

All notices (including but not limited to designations, notifications and reports) given or required to be given to or by either party shall be in writing and all such notices shall be forwarded by registered or certified mail to the addresses set forth on the first page of this Agreement or to such other addresses as

either party may notify the other by certified or registered mail. Notices served as herein provided shall be deemed effective and served as of the date of the certified or registered mailing thereof. Notices to Busch shall be to the attention of Mr. Dennis P. Long, Vice President, or his successor, and notice to Associates shall be to the attention of Mr. Ralph Tolve, Vice President, or his successor.

XIV. ASSIGNMENT

Associates shall not assign, sell, convey, transfer, mortgage or pledge this Agreement, except to an affiliate of Associates. An affiliate shall be a wholly owned subsidiary of Associates. Such assignment to an affiliate shall be effective only upon submission to Busch of a duplicate original of the instrument of assignment which shall contain a clause under which the assignee shall assume and agree to perform all of the terms, covenants and conditions to be performed by Associates hereunder. Notwithstanding such assignment and assumption, Busch shall have the right to look to the assignor should the assignee fail to perform.

XV. AMENDMENT AND INTERPRETATION

(a) This Agreement may be amended only by an instrument in writing signed by the party against whom enforcement of such amendment may be sought.

(b) This Agreement shall be governed by and interpreted in accordance with the laws of the State of Florida.

XVI. NON-WAIVER OF RIGHTS

No waiver by Busch of any default on the part of Associates in

performance of any of the terms, covenants or conditions hereof to be performed, kept or observed by Associates shall be or shall be construed to be a waiver by Busch of any other or subsequent default in performance of any of the said terms, covenants and conditions.

XVII. HEADINGS

The paragraph headings, if any, are inserted herein only for convenience and for reference, and in no way define, limit or otherwise describe the scope or intent of any provision hereof.

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement to be duly executed the day and year first above written by a person duly authorized.

RESTAURANT ASSOCIATES INDUSTRIES, INC.

By_____

_____
Title

_____
Date

ANHEUSER-BUSCH, INCORPORATED

By_____

_____
Title

_____
Date

A 447

PLAINTIFF'S EXHIBIT 7

LETTER DATED NOVEMBER 7, 1974 FROM LEONE BERNSTEIN TO MR. JAMES R. BICKLE TOGETHER WITH SEVENTEEN (17) PAGE PROPOSED DRAFT OF AN AGREEMENT BETWEEN ANHEUSER-BUSCH INCORPORATED AND RESTAURANT ASSOCIATES INDUSTRIES, INC.

November 7, 1974

Mr. James Bickel
Manager, Merchandise & Food Operations
Anheuser Busch, Incorporated
Busch Gardens Division
2800 South 9th Street
St. Louis
Missouri 63118

Re: Revised Agreement - Busch Gardens Tampa Florida

Dear Mr. Bickel:

Enclosed are two copies of our revised draft of the proposed agreement covering the Old Swiss House at Busch Gardens in Tampa. I have made certain changes to your draft, most of which attempt only more accurately to reflect what is in fact presently being done at the facility. You will note that I have also added a provision, Article XVIII, covering the extension of the prior agreement through November 3, 1974 with certain amendments again to provide for what was actually in effect with respect to the total operation.

Should you have any questions or comments, I would be pleased to discuss them with you. Otherwise, if you would have both copies executed by Anheuser Busch, Incorporated and forwarded to me, I will return one fully executed copy to you as promptly as possible.

Very truly yours,

enc.

cc Mr. William Thurman (enc.)
Mr. Ralph Tolve
Mr. Verne Clements

BEST COPY AVAILABLE

LB:mdb

A 448

Plaintiff's Exhibit 7

THIS AGREEMENT dated , 1974, but commencing as hereinafter set out, between ANHEUSER-BUSCH, INCORPORATED, a Missouri corporation, with principal offices at 721 Pestalozzi Street, St. Louis, Missouri ("Busch"), and RESTAURANT ASSOCIATES INDUSTRIES, INC., a Delaware corporation, with principal offices at 1540 Broadway, New York, New York ("Associates").

PREAMBLE

Busch is the owner of certain premises in Tampa, Florida known as Busch Gardens, upon which premises is located a restaurant known as The Old Swiss House ("The Restaurant"). Associates is engaged in the business of managing restaurant and food and beverage operations and of offering consultation services in respect thereto. Busch is desirous of employing Associates to act as its agent in managing the food and beverage operations at The Restaurant, and Associates is desirous of providing such service.

NOW, THEREFORE, it is agreed that:

I. DEFINITIONS

When used throughout this Agreement, the following terms shall have the meanings indicated:

(a) "Equipment" shall mean all fixtures, machinery, tools, equipment and articles of personal property owned and furnished by Busch and used solely in connection with the operation of the food and beverage service conducted at The Restaurant, and all replacements therefor.

(b) "Net Profit" shall mean the amount by which Gross Receipts exceed Operating Expenses. "Net Deficit" shall mean the amount by which Operating Expenses exceed Gross Receipts.

(c) "Gross Receipts" shall mean all revenues and income of any kind derived directly or indirectly and actually received from the food and

beverage service at The Restaurant, including without limitation, from the sale, whether on a cash or credit basis, of food, beverages and tobacco, excluding gratuities to employees paid by customers in connection with purchases made by them. The term "Gross Receipts" in respect of revenues resulting from the operation of any vending machines owned and installed by Associates for public use shall be all revenues received from the machines; however, with respect to any such machines installed in The Restaurant and owned by persons other than Associates, the term "Gross Receipts" shall be limited to the revenues received, collected, or that may be payable to Associates by such owners pursuant to contracts with said owners.

(d) "Operating Expenses" shall mean the aggregate of all expenses paid or incurred in connection directly and exclusively with the business conducted at The Restaurant in accordance with the accrual method of standard restaurant accounting procedures. Without limiting the generality of the foregoing, Operating Expenses shall include the cost of:

(i) Wages, salaries, payroll taxes, Social Security taxes, fringe benefits and other usual and customary incidental employee benefits paid to and for employees who are employed directly and exclusively in connection with the business conducted at The Restaurant.

(ii) Cost of food, beverages and tobacco sold in, on or from The Restaurant or in such manner that the amounts received therefor would be included in the term "Gross Receipts" as defined in this Agreement.

(iii) Maintenance costs, the payment for which Associates is obligated under the provisions of paragraph VI. (d) hereof.

(iv) Cost of all laundry and linen service and trash removal.

(v) Cost of all utilities consumed at The Restaurant.

(vi) Miscellaneous expenses incurred in providing the business conducted at The Restaurant with such items as china, glassware, silverware, utensils, cleaning supplies, paper supplies, sales promotion, public relations and advertising, office supplies, armored car service, credit card service, bad debts expense, dues, subscriptions and similar items routinely incurred in the day-to-day affairs of The Restaurant.

(vii) All payments made to Busch based on a percentage of the aggregate daily Gross Receipts as required by paragraph III. (a) (i) (7) hereof.

II. PURPOSE AND SCOPE OF AGREEMENT

(a) Busch engages Associates to serve as Busch's agent in the management and operation of the food and beverage services at The Restaurant under the terms and conditions hereinafter contained. Associates, subject to the terms and conditions hereinafter contained, agrees to serve as Busch's agent to that extent. This Agreement is intended to create a principal/agent relationship between the parties and is not intended to create a partnership or a joint venture, or to employ Associates as an independent contractor.

(b) Associates shall manage The Restaurant as the agent for and under the direction of Busch, according to the highest standards of performance and judgement attainable within the policies, rules and regulations set forth by Busch and imposed by law. At all times during Associates' performance hereunder, Busch shall have the right to oversee, control and direct any and all operations of The Restaurant.

Without limiting the generality of the foregoing, the choice of menu items and prices for such items sold in The Restaurant shall be subject to the prior approval of Busch. All advertising and promotional activities shall likewise be subject to the prior approval of Busch. Busch has the right

to inspect and examine Associates' operation of the service and to require reasonable corrective measures for what Busch deems, in its reasonable judgement, to be substandard performance. All repairs and maintenance shall be performed at the direction of Busch.

III. UNDERTAKINGS OF ASSOCIATES

(a) Associates shall during the term of this Agreement, in the discharge of its duties hereunder, among other things:

(i) Manage food and beverage service at The Restaurant to the best of its ability in accordance with the terms and conditions herein and in accordance with all applicable governmental laws and regulations. In this regard, Associates shall, among other things and without limiting the generality of the foregoing:

(1) Collect all Gross Receipts and promptly pay or cause to be paid on behalf of Busch all Operating Expenses incurred in connection with the operation of The Restaurant.

(2) On behalf of Busch, negotiate and enter into contracts required for the operation of The Restaurant during the term of this Agreement. In no case shall any contract have a term which exceeds the initial term of this Agreement unless Busch gives prior written approval for any such longer term.

(3) Maintain in accordance with recognized restaurant accounting procedures, for so long as this Agreement is in force and for one year thereafter, separate records and books of account, recording all transactions at or in any way connected with the operation of The Restaurant including invoices and purchase orders, which books and records shall, during ordinary business hours, be open to examination

for the purposes of an audit of Gross Receipts and Operating Expenses, by Busch or its representatives. Associates agrees to cooperate in any such examination or inspection.

(4) Use its best efforts to make a profit.

(5) Correlate the operations of The Restaurant with any special events, promotions or programs conducted by Busch at Busch Gardens.

(6) Employ on a full-time basis, two (2) maintenance men to do minor maintenance necessary to the routine operation of The Restaurant.

(7) (i) Make Payment to Busch for each Term Year of amounts equal to two and one-half percent (2-½%) of the aggregate daily Gross Receipts from the operation of The Restaurant until such Gross Receipts on a cumulative basis for the respective Term Year shall equal $1,200,000 and, thereafter for the balance of such Term Year, five percent (5%) of such aggregate daily Gross Receipts as exceed, on a cumulative basis, $1,200,000. Each Term Year and any fractional Term Year shall be independent and separate from any other period for the purposes of determining the amount payable hereunder.

(ii) On each following operating week, Associates will furnish to Busch a report of the Gross Receipts for the previous week. Within four (4) weeks following the end of each of Associates' accounting months, and within four (4) weeks following the termination or expiration of this Agreement, Associates shall render to Busch a statement covering, for the previous month and cumulatively for the period from the beginning of the Term Year to the end of such previous accounting month, the

following: (a) the aggregate Gross Receipts; (b) the aggregate Operating Expenses; (c) the percentage payment due Busch hereunder, and (d) a profit and loss statement for The Restaurant. Each profit and loss statement shall be certified accurate by an officer of Associates and shall be subject to audit by Busch, which audit, if Busch elects to perform, shall be performed within a reasonable period of time, but in no event later than thirty (30) days after the rendering to Busch of such certified statement. Associates shall pay over to Busch the monthly percentage payment then due for the previous month together with the rendering to Busch of the monthly statement. Acceptance of such payment by Busch shall not be construed as Busch's concurrence in the validity of the statement presented, nor as a waiver of any right which Busch may have to seek further payment from Associates.

(ii) Prepare a weekly list of repair replacement and maintenance items and shall submit requests for work to be performed to the General Manager of Busch Gardens, Tampa. However, in emergency situations Associates may, as Busch's agent, proceed as circumstances warrant.

(iii) Provide the labor for maintenance work as required by the provisions of paragraph VI. (d).

(b) All property and Equipment provided by Busch hereunder shall remain the property of Busch and Associates shall not sell, lease, pledge or otherwise encumber the Equipment.

IV. UNDERTAKINGS OF BUSCH

(a) Busch agrees to make available to Associates, free of charge, the use of The Restaurant and the use of the Equipment therein during the term

of this Agreement, and Busch agrees that Associates shall peaceably and quietly enjoy the use of The Restaurant and the use of the Equipment therein subject to the provisions of this Agreement for so long as Associates performs its obligations hereunder.

(b) Busch shall make all repairs and replacements and perform all maintenance in and to The Restaurant and the Equipment located therein for which Busch is obligated by the provisions of paragraph VI. hereof. The cost thereof shall not be included in Operating Expenses.

(c) Busch shall maintain, repair and replace the flags in front of The Restaurant. Such costs shall not be included in Operating Expenses.

V. AGENT'S COMMISSION

For the services rendered hereunder, Associates shall retain the Net Profit for each Term Year. In the event that the business of The Restaurant for any Term Year shall result in a Net Deficit for that year, Busch will reimburse Associates the amount of the Net Deficit within ninety (90) days following the end of the period for completion of the audit of The Restaurant profit and loss statement by Busch as set forth in paragraph III. (a) (i) (7) above.

VI. MAINTENANCE

(a) Pursuant to the provisions of paragraph III. (a) (ii), Associates shall notify Busch of any and all necessary maintenance, repair or replacement work in and to the interior and exterior of The Restaurant and the Equipment located therein. The General Manager of Busch Gardens will then determine in his reasonable business judgement, whether the work is to be performed and, if so, the proper party to perform. All maintenance, repair or replace-

ment work will be done by (i) maintenance men employed by Associates pursuant to the terms of paragraph III. (a) (i) (6) hereof, (ii) independent contractor (s), or (iii) Busch personnel.

(b) The cost of all maintenance, replacement and repair items will either be borne directly by Busch or be included in Operating Expenses. It is the general intent of the parties that Busch will bear the cost of all such maintenance,replacement and repair work, including without limitation repair and replacement of capital equipment and minor or routine maintenance except the cost of labor where such minor or routine maintenance can be performed by Associates' maintenance men, in which event such cost will be charged to Operating Expenses.

(c) Without limiting the generality of the foregoing, those items to be borne directly by Busch shall include:

(i) The cost of maintaining the exterior of The Restaurant.

(ii) All direct and indirect labor charges and expenses related to maintenance, repair or replacement work performed in or to The Restaurant and Equipment by Busch personnel.

(iii) The cost of all materials, supplies, parts and the like required for the repair, replacement or maintenance of The Restaurant and the Equipment and/or facilities within, or a part of, The Restaurant.

(iv) All labor and material costs incurred in connection with the utilization of outside contractors, including contractors under service agreements,to perform repair,replacement and/or maintenance work in The Restaurant and to Equipment located therein.

(d) Items which shall be charged as Operating Expenses include all direct and indirect labor charges and expenses related to the two (2)

maintenance men employed by Associates pursuant to the provisons of paragraph III. (a) (i) (6).

VII. TERM

(a) The initial term of Associates' appointment as agent to manage The Restaurant shall commence on November 4, 1974 and terminate three (3) years thereafter. For purposes of this Agreement, "Term Year" shall mean the period beginning on November 4 through and including the following November 3rd of each year of the term hereof.

(b) This Agreement shall be automatically renewed for additional terms of one (1) year, upon the same terms and conditions contained herein (including without limitation this automatic renewal provision), or as later amended, without further written instrument between the parties, unless either party shall give written notice to the other not less than ninety (90) days prior to the expiration of the initial term or any additional term that the Agreement shall terminate at the end of the initial term or the additional term.

VIII. UTILITIES

Busch shall have the right to temporarily discontinue the supply of all or any of the utilities services when reasonably necessary in making repairs, alterations, changes or improvements in The Restaurant or elsewhere.

IX. GOVERNMENTAL REQUIREMENTS

Associates shall observe and promptly execute the provisions of any and all present and future governmental laws, rules, regulations and other demands pertaining to its activities or occupancy hereunder.

X. TERMINATION

(a) Busch may at any time during the term of this Agreement, upon

(10) days' written notice to Associates, terminate this Agreement upon the occurrence of any one or more of the following events:

(i) Associates shall become insolvent, take the benefit of any present or future insolvency statute, make a general assignment for the benefit of creditors, file a petition in bankruptcy or a petition or answer seeking an arrangement, reorganization or the readjustment of its indebtedness under the federal bankruptcy laws or any other similar federal or state law, be adjudged a bankrupt or consent to the appointment of a receiver, trustee, or liquidator of all or substantially all of its property; or

(ii) Associates shall be in default in the performance of any of the terms, covenants or conditions hereof to be performed, kept or observed by Associates, which such default Associates shall not have cured within ten (10) days after receipt of written notice thereof, or in the event such default is not capable of being cured within such ten-day period, which said default Associates shall not have commenced steps to cure within said period and thereafter diligently pursued same to completion.

(b) No waiver by Busch of any default on the part of Associates in performance of any of the terms, covenants or conditions hereof to be performed, kept or observed by Associates shall be or shall be construed to be a waiver by Busch of any other or subsequent default in performance of any of the said terms, covenants and conditions.

(c) Busch shall have the right to temporarily close to the public the Busch Gardens or any part thereof, including The Restaurant for any cause whatsoever; provided, however, that if The Restaurant is closed by Busch for a period of more than three consecutive days, Busch will reimburse

Associates for substantiated fixed labor costs (excluding prescheduled vacations) which Associates incurs with respect to its employees regularly employed in The Restaurant who cannot economically be transferred by Associates to a productive capacity elsewhere. This obligation for reimbursement shall extend only from the 4th consecutive day of such closing through the 10th consecutive day regardless of the ultimate length of such continuous closing. Busch also agrees to give Associates at least thirty (30) days' prior written notice if Busch plans modifications to all or a portion of the Busch Gardens which will require closing The Restaurant.

(d) In the event the performance of this Agreement by either party is prevented by laws, rules or regulations of any governmental body or agency, this Agreement shall terminate.

(e) At the time of termination of this Agreement, an inventory shall be taken of all food, beverages and all other supplies on hand, including but not limited to, china, glassware, tableware, utensils, cleaning supplies and paper supplies, all of which shall be purchased by Busch from Associates at the actual net invoiced price.

XI. INDEMNITY, LIABILITY AND INSURANCE

(a) Associates agrees to indemnify and hold Busch harmless from and against any and all cost or expense resulting from a claim, settlement, suit or action for personal injury (including death) or property damage suffered by any person, corporation or organization whatsoever, where such personal injury or property damage arose out of the negligent act or omission of Associates, its officer(s), agent(s) or employee(s).

(b) Busch agrees to indemnify and hold Associates harmless from and against any and all cost or expense resulting from a claim, settlement,

suit or action for personal injury (including death) or property damage suffered by any person, corporation or organization whatsoever, where such personal injury or property damage arose out of the negligent act or omission of Busch, its officer(s), agent(s), employee(s),invitee(s),contractor(s) or others doing business with it.

(c) Busch shall procure and obtain for its account such insurance coverage as necessary with Associates named as co-insured where applicable and Busch shall furnish a certificate of such insurance to Associates upon request.

XII. CASUALTY LOSS

It is expressly understood that should The Restaurant, or any part thereof, be damaged or destroyed by any cause whatsoever, Busch has the option of rebuilding, repairing, or replacing such property as has been damaged or destroyed, or of not rebuilding or replacing same, whichever is deemed more expedient or desirable by Busch, and Busch shall not be responsible to Associates for any damages it may incur from prospective loss of income or otherwise, as a consequence thereof. Busch agrees to exercise such option and make its decision and thereupon give written notice to Associates within sixty (60) days after the occurrence of such damage or destruction. In the event said damage or destruction shall cause substantial interference with or loss of business conducted at The Restaurant and Busch shall not rebuild, repair or replace such damaged or destroyed property within ninety (90) days after the occurrence of said damage or destruction, then Associates shall have the right to terminate this Agreement on thirty (30) days prior written notice to Busch.

XIII. NOTICES

All notices (including but not limited to designations and notifications) given or required to be given to or by either party shall be in writing and all such notices shall be forwarded by registered or certified mail to the addresses set forth on the first page of this Agreement or to such other addresses as either party may notify the other by certified or registered mail. Notices served as herein provided shall be deemed effective and served as of the date of the certified or registered mailing thereof. Notices to Busch shall be to the attention of Mr. Dennis P. Long, Vice President, or his successor, and notice to Associates shall be to the attention of Mr. Ralph Tolve, Vice President, or his successor.

XIV. ASSIGNMENT

Associates shall not assign, sell, convey, transfer, mortgage or pledge this Agreement, except to an affiliate of Associates. An affiliate shall be a wholly owned subsidiary of Associates. Such assignment to an affiliate shall be effective only upon submission to Busch of a duplicate original of the instrument of assignment which shall contain a clause under which the assignee shall assume and agree to perform all of the terms, covenants and conditions to be performed by Associates hereunder. Notwithstanding such assignment and assumption, Busch shall have the right to look to the assignor should the assignee fail to perform.

XV. SPECIAL PROVISIONS

(a) The parties acknowledge that Busch intends to change the entrance to Busch Gardens so that The Restaurant will be outside the perimeter of Busch Gardens. Busch agrees, notwithstanding any such change, to continue to advertise and promote The Restaurant throughout Busch Gardens and to

encourage members of the public who are guests in Busch Gardens to use the food and beverage facilities in The Restaurant. Busch further agrees that it will at all times maintain free and ready access to members of the public between Busch Gardens and The Restaurant.

(b) Busch covenants and agrees not to own, operate or manage, nor to cause or permit, directly or indirectly, the ownership, operation or management of, any food and beverage facility on the premises of Busch Gardens which would be competitive in price or type of menu or service with The Restaurant. Busch further covenants and agrees that in the event it decides no longer to operate the food and beverage facilities in Busch Gardens with its own personnel, it will not enter into any agreement for the operation or management of any or all of such facilities with a third party without first offering in writing to enter into such agreement with Associates to so operate or manage such facilities on the same terms, covenants and conditions, and in the event Associates shall within 15 days after receipt of such written offer from Busch, which written offer shall contain all such terms, covenants and conditions as are contained in said proposed agreement, notify Busch in writing that it rejects such offer, then Busch shall be free to enter into said proposed agreement with said third party on all of the same terms, covenants and conditions offered to Associates and on no other terms, covenants and conditions. The right granted herein to Associates shall be a continuing right and shall apply to each and every change of ownership or management of the food and beverage facilities at Busch Gardens.

XVI. AMENDMENT AND INTERPRETATION

(a) This Agreement may be amended only by an instrument in writing signed by the party against whom enforcement of such amendment may be sought.

(b) This Agreement shall be governed by and interpreted in accordance with the laws of the State of Florida.

XVII. NON-WAIVER OF RIGHTS

No waiver by Busch of any default on the part of Associates in performance of any of the terms, covenants or conditions hereof to be performed, kept or observed by Associates shall be or shall be construed to be a waiver by Busch of any other or subsequent default in performance of any of the said terms, covenants and conditions.

XVIII AMENDMENT AND TERMINATION OF PRIOR AGREEMENT

The parties acknowledge that they entered into a management agreement dated December 8, 1972 ("Prior Agreement") pursuant to which Associates was retained to manage on behalf of Busch all the food and beverage facilities, including The Restaurant, in Busch Gardens, and that the Prior Agreement by its terms would have expired December 25, 1973. The parties further acknowledge and agree that Associates has continued to manage such food and beverage facilities subsequent to December 25, 1973 pursuant to all the terms, covenants and conditions contained in the Prior Agreement except that effective as of December 26, 1973, the Prior Agreement is amended as follows:

1. Section 1 (d) (iii) is deleted in its entirety and the following is inserted in lieu thereof:

(iii) Subject to the provisions of Section 3(b) and Section 7, costs of all maintenance, replacement and repair items will either be borne directly by Busch or be included in Operating Expenses. It is the general intent of the parties that Busch will bear the cost of all such maintenance, replacement and repair work including without limitation repair and replace-

ment of capital equipment and minor or routine maintenance, except the cost of labor where such minor or routine maintenance can be performed by Associates' maintenance men, in which event such cost will be charged to Operating Expenses. Without limiting the generality of the foregoing, those items to be borne directly by Busch shall include:

(a) The cost of maintaining the exterior of all food and beverage facilities in the Areas Furnished.

(b) All direct and indirect labor charges and expenses related to maintenance, repair or replacement work performed in the Areas Furnished and the Equipment located therein by Busch personnel.

(c) The cost of all materials, supplies, parts and the like required for the repair, replacement or maintenance of the Areas Furnished and the Equipment and/or facilities within, or a part of, the Areas Furnished.

(d) All labor and material costs incurred in connection with the utilization of outside contractors, including contractors under service agreements, to perform repair, replacement and/or maintenance work in the Areas Furnished and to Equipment located therein.

Items to be charged as Operating Expenses under this subparagraph (iii) shall be as follows:

(1) All direct and indirect labor charges and expenses related to the three (3) maintenance men employed by Associates to repair and maintain the Areas Furnished and the Equipment and/or facilities within, or a part of, the Areas Furnished.

(2) Costs of cleaning and janitorial services of the Areas Furnished and areas referred to in Section 3(b)(iv).

(3) Cost of all laundry and linen service and trash removal.

(4) Cost of all utilities consumed at the Areas Furnished.

2. That portion of Section 1(d)(v) following the word "plus" in the sixth line of such subparagraph shall be deleted in its entirety and the following inserted in lieu thereof:

"(2) with respect to the Business at the snack bars, juice bars, pretzel stand, food carts and all other food and beverage operations excluding (1) above, thirty-five per cent (35%) of the aggregate daily Gross Receipts therefrom."

3. The Prior Agreement, as herein amended, is extended for the period commencing as of December 26, 1973 and shall terminate November 3, 1974.

XVIX HEADINGS

The paragraph headings, if any, are inserted herein only for convenience and for reference, and in no way define, limit or otherwise describe the scope or intent of any provision hereof.

A 465

Plaintiff's Exhibit 7

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement to be duly executed as of the day and year first above written by a person duly authorized.

RESTAURANT ASSOCIATES INDUSTRIES, INC.

By_____

_____

Title

_____

Date

ANHEUSER-BUSCH, INCORPORATED

By_____

_____

Title

_____

Date

A 466

PLAINTIFF'S EXHIBIT 8

EXTENSION AGREEMENT BETWEEN HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS UNION, LOCAL 104-AFL-CIO AND RESTAURANT ASSOCIATES INDUSTRIES, INC.

EXTENSION AGREEMENT

It is agreed between HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS' UNION, LOCAL NO. 104 - AFL-CIO, Tampa, Florida and RESTAURANT ASSOCIATES INDUSTRIES, INC., operating the Old Swiss House at Busch Gardens, Florida, that the Agreement dated December 1, 1972, between the same parties, covering the employees at Busch Gardens, Florida, shall be extended and amended as follows:

1. Article I Section 1

Amend to read: The words "working in" are changed to read "employed by the Employer in The Old Swiss House."

2. Article VI Section 1 (Holidays)

Amend to read: In 1975 and thereafter Thanksgiving day shall become part of this Article and Section.

3. Article VII Section 4 (Vacations)

Amend to read: Employees who have been continuously employed for ten (10) years or more shall receive four (4) weeks vacation with pay based upon his regular rate for his normal work week.

EXHIBIT "A"

4. Job Classification

	11-4-74	11-4-75
Broiler	3.24	P.F. 3.34 Silver
Cook	2.96	3.06
Fry and Grill Cook	2.47	2.57
Baker	2.59	2.69
Cook's Helper	2.25	2.35
Pantry	2.25	2.35
Cafe Cashier	2.35	2.45
Cafe Counter	2.25	2.35

Cafe Prep.	2.35	
Cafe Pantry Helper	2.25	2.35
Dish and Pot Washers	2.25	2.35
Food Runner	2.25	2.35
General Utility	2.25	2.35
Food Carver	2.25	2.35
Porter and Housekeeping	2.25	2.35
Butcher - Cook	2.54	2.64
Prep Girl	2.35	2.45
Head Bartender	2.94	3.04
Bartender	2.54	2.64
Swing Man	2.63	2.73

EXHIBIT "B"

4. Luncheon Waitress	1.57	1.62
Dinner Waitress	1.57	1.62
Dining Room Bus Help	1.68	1.73
Cafe Bus Help	1.52	1.57

5. Eliminate Exhibit "D" in its entirety.

6. All other terms and conditions of the agreement, dated December 1, 1972, shall remain in full force and effect for the term expiring November 4, 1976.

IN WITNESS WHEREOF, the parties hereto have executed this Extension Agreement this 3rd day of December, 1974.

RESTAURANT ASSOCIATES INDUSTRIES, INC.

By: Sidney Shlenger

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS' UNION, LOCAL NO. 104

By: Ernest Fossa

A 468

PLAINTIFF'S EXHIBIT 9

LETTER DATED AUGUST 1, 1974 FROM JAMES R. BICKLE TO MR. VERNE CLEMENTS TOGETHER WITH ENVELOPE

August 1, 1974

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Mr. Verne Clements, Vice President
Restaurant Associates Industries, Inc.
Miamarina Restaurant
301 N.E. Miamarina Parkway Drive
Miami, Florida 33132

Dear Verne:

As provided in our Agreement, we are hereby giving written notice of proposed changes in the upcoming operating contract with Restaurant Associates Industries, Inc.

We will be forwarding shortly for your consideration a letter spelling out the changes as we see them.

Yours truly,

James R. Bickle
Manager
Merchandise & Food Operations

JRB:DV

Keep America Beautiful

ANHEUSER-BUSCH, INC.

ST. LOUIS, MISSOURI 63118

SAINT LOUIS AUG-1'74 MO PB 395134 1 03

CERTIFIED
No 428982
MAIL

REGISTERED MAIL
RETURN RECEIPT REQUESTED

VIA AIR MAIL

Mr. Verne Clements, Vice President
Restaurant Associates Industries, Inc.
Miamarina Restaurant
301 N.E. Miamarina Parkway Drive
Miami, Florida 33132

Plaintiff's Exhibit 9

A-469

A 470

PLAINTIFF'S EXHIBIT 10

LETTER DATED MAY 21, 1975 FROM DENNIS P. LONG
TO MR. RALPH TOLVE

OFFICE OF
VICE PRESIDENT
AND GROUP EXECUTIVE

Anheuser-Busch, Inc.

EXECUTIVE OFFICES
ST. LOUIS, MO., U.S.A. 63

May 21, 1975

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Mr. Ralph Tolve, Vice President
Restaurant Associates Industries, Incorporated
1540 Broadway
New York, New York 10036

Re: Agency Agreement dated December 8, 1972 between Anheuser-Busch, Incorporated and Restaurant Associates Industries, Incorporated involving the operation of The Old Swiss House restaurant.

Dear Mr. Tolve:

By letter of August 1, 1974, we notified you of our intent to terminate the subject agreement as to the terms and conditions then in effect. As we have since been unable to reach agreement as to mutually acceptable terms upon which to continue our relationship, this letter is to notify you of the termination of your agency effective midnight, June 30, 1975.

This letter will also serve to revoke all prior authority given Restaurant Associates Industries, Incorporated to bind Anheuser-Busch, Incorporated to any new contract during the remainder of the term of your agency. Notwithstanding the immediately preceding sentence, you are authorized to continue to purchase such food and beverage inventory items under existing blanket purchase orders as are necessary for the operation of The Old Swiss House.

We trust that as our agent you will assist us in the orderly transition of business to your successor.

Yours very truly,

Dennis P. Long

Dennis P. Long
Vice President and
Group Executive

DPL:kw

Keep
America
Beautiful

A 471

PLAINTIFF'S EXHIBIT 12

LETTER DATED MARCH 13, 1973 FROM DENNIS P. LONG
TO MR. RALPH TOLVE

Anheuser-Busch, Inc.

EXECUTIVE OFFICES
ST. LOUIS, MO., U.S.A. 63118

OFFICE OF
VICE PRESIDENT

March 13, 1973

Mr. Ralph Tolve, President
Recreational Services Division
Restaurant Associates Industries, Inc.
1540 Broadway
New York, New York 10036

Dear Ralph:

Outstanding Reimbursements - Restaurant Associates

The contract for the period December 26, 1971 - December 25, 1973, between Anheuser-Busch and Restaurant Associates, although never signed, has been agreed to by both parties. It contained clauses relative to maintenance in areas furnished (Section 1 (iii), Section 3 (ii, iii, v and vi)). It is my understanding that during the 1972 operating year, it became evident that this maintenance responsibility was somewhat nebulous, and it was agreed that Anheuser-Busch would pay the questionable expenses and then backcharge Restaurant Associates after a review and mutual agreement of payment responsibility.

I also understand that a meeting was held in August, 1972 attended by Messrs. R. Bender, H. Greenblatt, R. Bean, H. Koenig of Anheuser-Busch and R. Tolve, V. Clements and A. Anderson of Restaurant Associates where specific jobs and expenses were reviewed. It was mutually agreed at that time that the following statement would be (and subsequently has been) incorporated into the contract and would apply retroactively from December 26, 1971:

1. All food and beverage facilities in all areas furnished under the terms of this contract are the property of Anheuser-Busch, Inc. Therefore, all repairs and maintenance shall be performed at the direction of Anheuser-Busch, Inc.

2. With the exception of cases involving an emergency, Restaurant Associates shall prepare a weekly list of repair and maintenance items and shall submit requests for work to be performed to the General Manager of Busch Gardens, Tampa. The General Manager will then determine the proper method of performing the work as follows:

   a. Work to be performed by Restaurant Associates maintenance men.

   b. Work to be performed by outside contractors.

   c. Work to be performed by Anheuser-Busch brewery personnel.

Keep
America
Beautiful

A 472

Plaintiff's Exhibit 12

3. Costs of all maintenance and repair items are to be borne either by Busch Gardens or charged to the operation of the food and beverage facilities. Those to be borne directly by Busch Gardens are as follows:

   a. Exteriors of all food and beverage facilities in areas furnished.

   b. All capital expenditures. Determination as to what is and what is not a capital expenditure is to be made by Busch Gardens management.

   c. All work performed by Anheuser-Busch, Inc. brewery employees.

   Costs of maintenance and repair work to be charged against food and beverage operations, are as follows:

   a. All cleaning of areas furnished.

   b. Repair and replacement to all interiors of facilities within areas furnished, excluding capital expenditures.

   c. All repair and replacement of food carts and equipment not involving a capital expenditure.

   d. Salaries of three (3) maintenance men.

   e. Laundry, linen service and trash removal.

   f. Cost of all utilities in furnished areas.

   g. All costs in connection with the following shall be charged directly to Restaurant Associates provided the total amount does not exceed $30,000 annually. All costs in excess of $30,000 annually in this category shall be borne directly by Busch Gardens:

      1. Materials required for repair and replacement in connection with work performed by Restaurant Associates' maintenance employees.

      2. Labor and material costs in connection with outside contractors and maintenance and repair of interiors and equipment in furnished areas.

      3. Service contracts in connection with furnished areas.

A 473

Plaintiff's Exhibit 12

Based upon those guidelines, the following list of maintenance expenses, paid by Anheuser-Busch during 1972, should be backcharged to Restaurant Associates (Attachment #1 details the totals shown below):

1.	Air conditioning service and repair	$ 3,486.68
2.	Elevator service and repair	809.16
3.	Plumbing services	245.43
	Outside Contractors	
4.	Materials	664.24
5.	Service	9,192.26
6.	Metered Utilities (Gas)	5,818.70
	Other Purchases	
7.	Red Mat	212.16
8.	Covers for Pretzel machines	147.68
	TOTAL	$20,576.31

Also outstanding (or unpaid) is Anheuser-Busch Invoice Number 16340, issued March 16, 1972 in the amount of $3,006.50 for repairs to the Carrier Centrifugal Unit necessitated by employee negligence as stated by Mr. Andy Anderson in a letter to Mr. Don Forsberg, Allstate Insurance Company, dated June 8, 1972 (see Attachments #2). Under Section 12 (a) of the signed agreement in force at the time of the repair work, Restaurant Associates agreed to reimburse Anheuser-Busch for all expense and loss resulting from damage to Anheuser-Busch's property caused by the act or omission of Restaurant Associates or its employees.

In summary, our records show that Restaurant Associates owes Anheuser-Busch a total of $23,582.81

As agreed, Anheuser-Busch owes Restaurant Associates the following:

Restaurant Associates Invoice Number 122, dated December 15, 1972.	$ 2,778.69 —
Tampa Sheet Metal Company for the construction of a Galvanized Cooler Box as directed by Restaurant Associates in the amount of	-693.48 —

If we deduct the $3,472.17 we owe you from the $23,582.81 owed us...we show a balance due to Anheuser-Busch from Restaurant Associates of $20,110.64 for 1972. As you and I agreed, we are both eager to settle this matter, so I'm sure you will pursue an expeditious handling.

A 474

Plaintiff's Exhibit 12

Also, by copy of this letter, I am advising Mr. H. Koenig of the Tampa Gardens Business Office of the type of maintenance expenses that should be paid by Restaurant Associates, plus the fact that according to the agreement janitorial service, water, electricity, fuel, sanitary sewer and contract maintenance expense that are attributed to the interior of the Swiss House should be charged to Restaurant Associates.

Sincerely,

Dennis P. Long

Dennis P. Long
Vice President

DPL:kw

Attachments

cc: Messrs. R. A. Bates
R. B. Bean
H. M. Greenblatt
H. L. Koenig
R. A. Schwartz

A 475

Plaintiff's Exhibit 12

Attachment #1

BACKCHARGES TO RESTAURANT ASSOCIATES

1. Air Conditioning Services & Repair

DATE	VENDOR'S NAME	AMOUNT	DESCRIPTION OF SERVICE OR MATL.
June	Hill York Air Cond. Co.	$ 48.15	Repair air conditioner
July	" "	541.50	" "
July	" "	185.25	" "
Aug.	" "	228.00	Routine maintenance
Aug.	" "	149.62	" "
Nov.	" "	124.40	
Nov.	" "	342.00	
Nov.	" "	484.50	Snack Bar
Dec.	" "	239.83	
Dec.	" "	684.00	
Dec.	" "	3.38	Snack Bar
Dec.	" "	456.00	Snack Bar
		$3,486.68	

2. Elevator Service and Repair

Dec.	Otis Elevator Company	134.86	Maintenance contract
Jan/Feb.	" "	269.72	" "
March	" "	134.86	" "
May	" "	134.86	" "
June	" "	134.86	"
		$ 809.16	

3. Plumbing Services

April	Crowell Plumbing Co.	177.70	Repairs hot water storage tanks
May	Ford Plumbing Co.	37.73	Repair ice maker
Dec.	Ford Plumbing Co.	30.00	Snack Bar
		$ 245.43	

4. Materials

May	Porter Paint Co.	131.85	Paint supplies for Terrace Room
June	Porter Paint Co.	45.19	Paint supplies for Blue Room
June	Porter Paint Co.	104.51	Paint supplies for Snack Bar
Aug.	Porter Paint Co.	101.36	Paint supplies for Bakery
Aug.	Bert Woodruff	4.16	Diaphram for steam control valve
Aug.	Porter Paint Co.	43.92	Painting supplies for Snack Bar
Nov.	Porter Paint Co.	75.48	
Nov.	Industrial Coding	125.00	Material-Paint Juice Boma
Nov.	Porter Paint Co.	20.69	Snack Bar
Dec.	Porter Paint Co.	12.08	
		$ 664.24	

5. Service

DATE	VENDOR'S NAME	AMOUNT	DESCRIPTION OF SERVICE OR MATL.
June	Ewell Construction Co.	$ 328.35	Painting Terrace Room
June	Ewell Construction Co.	1,920.87	Painting Blue Room & Snack Bar
April	Robison Electric Co.	44.96	Electrical repairs - Snack Bar
June	Steward Mellon Co.	137.73	Waterproof pipes over Bakery
Aug.	Ewell Construction Co.	2,109.40	Painting of interior of Snack Bar
Aug.	" "	169.15	Painting of Bakery
Aug.	" "	980.08	Painting of Banquet Room
Sept.	Tampa Armature	1,824.91	Oil safety switch carrier centrifuga units
Sept.	J. De Lotto	60.09	Install floor base at serving counte
Aug.	Robison Electric Co.	23.32	Repair ice machines - Juice Bar
Aug.	Kal Mar Construction	74.54	Repairs at Pretzel Stand
Oct.	" "	13.98	Repairs at Juice Bar
Sept.	Robison Electric Co.	47.91	Repair snack bar fans
Nov.	" "	100.55	
Nov.	Industrial Coding	378.24	Labor & matl. to paint dining room
Nov.	Blanton Glass	215.64	Snack Bar
Nov.	Scotsman Dist.	23.63	Ice machine repair - Snack Bar
Dec.	Ewell Painting	338.30	
Dec.	Kalmar	189.41	Ceiling patch - Snack Bar
Dec.	Ewell Construction Co.	211.20	Painting - Snack Bar
		$9,192.26	

6. Metered Utilities

April	Peoples Gas System	589.60	Metered gas
May	" "	583.08	" "
Dec.	" "	472.51	" "
Jan.	" "	585.03	" "
Feb.	" "	671.45	" "
April	" "	722.44	" "
June	" "	530.17	" "
July	" "	574.95	" "
Aug.	" "	633.84	" "
Sept.	" "	455.63	" "
		$5,818.70	

7. Red Mat

May	Hurley Mat Company	$ 212.16	Purchase of red mat

8. Covers for Pretzel Machines

April	Tampa Sheet Metal	$ 147.68	Covers for pretzel machines

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Plaintiff's Exhibit 12

Anheuser-Busch, Inc.

TAMPA 4, FLA., U.S.A.

Amendment #2

INVOICE NO. T 16340

ORDER NO.	CUSTOMER A/C NO	CAN INITIAL & NUMBER	INV. NO.	INVOICE DATE
				2/9/72

SOLD TO:

Restaurant Associates
c/o The Old Cuban House
3310 Busch Boulevard
Tampa, Florida 33612

SHIPPED TO:

[illegible] DAYS

CODE	CODE PK-PKG.	STOCK (BULK)	QUANTITY	PRICE	ITEM DESCRIPTION	AMOUNT
					To invoice for costs of repairs to the Cuban Centennial unit located at the Old Cuban House by Tampa Armature Works, Inc. Attached letter from Tampa Armature Works that explains work due to continuing negligence by Restaurant Associates personnel.	$ 3,036.50
					TOTAL	$ 3,036.50

[illegible] Remit To:
Anheuser-Busch, Inc.
P.O. Box [illegible]
Treasury
Tampa, Florida 33603

020-1117-019 (03)

I HEREBY CERTIFY THAT THE GOODS COVERED BY THIS INVOICE WERE PRODUCED IN COMPLIANCE WITH ALL APPLICABLE REQUIREMENTS OF SECTIONS 6, 7 AND 12 OF THE FAIR LABOR STANDARDS ACT, AS AMENDED, AND OF REGULATIONS AND ORDERS OF THE U. S. DEPARTMENT OF LABOR ISSUED UNDER SECTION 14 THEREOF.

4% BEER AS INDICATED IS 4% BY VOLUME AND IS THEREFORE NOT IN EXCESS OF 3.2% BY WEIGHT.

I HAVE TAKEN THE LIBERTY OF DRAWING ON YOU FOR $ AT
AND REQUEST ACCEPTANCE AND PROTECTION OF OUR DRAFT ON PRESENTATION.

BUDWEISER—MICHELOB—BUSCH—BUD—Trademarks of Anheuser-Busch, Inc. Registered with U. S. Patent Office

POSTING COPY

3

BEST COPY AVAILABLE

A 478
Plaintiff's Exhibit 12

The Old Swiss House

3610 BUSCH BOULEVARD
TAMPA, FLORIDA 33612
PHONE (813) 933-4035

June 8, 1972

Mr. Don Forsberg
Allstate Insurance Co.
Tampa, Florida

Dear Mr. Forsberg:

My name is Henning G. Anderson employed by Restaurant Associates Industries as General Manager of the Swiss House Food Operations in Tampa, Florida. I have held this position since November, 1969.

On October 12, 1971, Tampa Armature Works Inc. was called to the Swiss House to check on our air conditioning system. It was discovered that the centrifugal machine had lost oil due to low condenser water temperature. The tower fan was in hand position. An aquastat could not cut if off.

We at this particular time had an employee Mr. John Phillips whom is no longer connected with us had by mistake put the switch on manual operation. I feel that this damage was caused through mistake or negligence by this employee.

Restaurant Associates are at all times responsible to Anheuser-Busch for any property damage. It is our duty to notify the engineering department on the premises when malfunction of a major nature occurs. This was so done but the damage had already taken place.

Should you have any further questions, please do not hesitate to call.

Yours very truly,

Andy Anderson
Director of Operations

AA/aw

A 479

PLAINTIFF'S EXHIBIT 13

AGREEMENT DATED MAY 30, 1975 BETWEEN ANHEUSER-BUSCH INCORPORATED AND SHERMAN MANAGEMENT CORPORATION

THIS AGREEMENT dated May 30th, 1975, but commencing as hereinafter set out, is between ANHEUSER-BUSCH, INCORPORATED, a Missouri corporation, with principal offices at 721 Pestalozzi Street, St. Louis, Missouri ("Principal"), and ~~SIDNEY SHERMAN, an individual doing business as~~ SHERMAN MANAGEMENT CORRATION, with principal offices at 209 TANGLEWOOD PL., TEMPLE TERRACE FLORIDA 33617 ("Agent").

PREAMBLE

Principal is the owner of certain premises in Tampa, Florida known as Busch Gardens, upon which premises is located a restaurant known as The Old Swiss House, ("The Restaurant"). Agent is engaged in the business of managing restaurant and food and beverage operations and of offering consultation services with respect thereto. Principal is desirous of employing Agent to act as its agent in managing the food and beverage operations at The Restaurant, and Agent is desirous of providing such service.

NOW, THEREFORE, it is agreed that:

I. DEFINITIONS

When used throughout this Agreement, the following terms shall have the meanings indicated:

(a) "Equipment" shall mean all fixtures, machinery, tools, equipment and articles of personal property owned and furnished by Principal and used solely in connection with the operation of the food and beverage service conducted at The Restaurant, and all replacements therefor.

(b) "Net Profit" shall mean the amount by which Gross Receipts exceed Operating Expenses.

(c) "Gross Receipt" shall mean all revenues and income of any kind derived directly or indirectly and actually received from catering services or the food and beverage service both at The Restaurant or elsewhere, including without limitation, from the sale, whether on a cash or credit basis, beverages and tobacco, excluding, however, federal, state and municipal excise and sales taxes and excluding gratuities to employees paid by customers in connection with purchases made by them.

(d) "Operating Expenses" shall mean the aggregate of all expenses paid or incurred in connection directly and exclusively with the business conducted at The Restaurant in accordance with the accrual method of standard accounting procedures. Without limiting the generality of the foregoing, Operating Expenses shall include the cost of:

(i) Wages, salaries, payroll taxes, Social Security taxes, fringe benefits and other usual and customary incidental employee benefits paid to and for employees who are employed directly and exclusively in connection with the business conducted at The Restaurant.

(ii) Cost of food, beverages and tobacco sold in, on or from The Restaurant.

(iii) Maintenance costs, the payment for which Agent is obligated under the provisions of paragraph VI. (d) hereof.

(iv) Miscellaneous expenses incurred in providing the business conducted at The Restaurant with such items as china, glassware, silverware, utensils, cleaning supplies, paper supplies, sales promotion, public relations and advertising, office supplies, armored car service, credit card service, bad debts expense, dues, subscriptions, laundry and similar items routinely incurred in the day-to-day affairs of The Restaurant.

II. PURPOSE AND SCOPE OF AGREEMENT

(a) Principal engages Agent to serve as its agent in the management and operation of the food and beverage services at The Restaurant under the terms and conditions hereinafter contained. Agent, subject to the terms and conditions hereinafter contained, agrees to serve as Principal's agent to that extent. This Agreement is intended to create a principal/agent relationship between the parties and is not intended to create a partnership or a joint venture, or to employ Agent as an independent contractor.

(b) Agent shall manage The Restaurant as the agent for and under the direction of Principal and imposed by law. At all times during Agent's performance hereunder, Principal shall have the right to oversee, control and direct any and all operations of The Restaurant. The choice of menu items and prices for the items sold shall be subject to the approval of Busch. Principal.

Without limiting the generality of the foregoing, the choice of menu items and prices for such items sold in The Restaurant shall be subject to the prior approval of Principal. All advertising and promotional activities shall likewise be subject to the prior approval of Principal. Principal has the right to inspect and examine Agent's operation of the service and to require reasonable corrective measures for what principal deems to be substandard performance. All repairs and maintenance shall be performed at the direction of Principal.

III. UNDERTAKINGS OF AGENT

(a) Agent shall during the term of this Agreement, in the discharge of its duties hereunder, among other things:

(i) Manage food and beverage service at The Restaurant to the best of its ability in accordance with the terms and conditions herein and

in accordance with all applicable governmental laws and regulations. In this regard, Agent shall, among other things and without limiting the generality of the foregoing:

(1) Collect all Gross Receipts and promptly pay or cause to be paid on behalf of Principal all Operating Expenses incurred in connection with the operation of The Restaurant.

(2) On behalf of Principal, negotiate and enter into contracts required for the operation of The Restaurant during the term of this Agreement. No contract shall have a term which exceeds the initial term of this Agreement unless Principal gives prior written approval for any such longer term.

(3) Maintain in accordance with recognized accounting procedures, for so long as this Agreement is in force and for one year thereafter, separate records and books of account, recording all transactions at or in any way connected with the operation of The Restaurant including invoices and purchase orders, which books and records shall, during ordinary business hours, be open to examination for the purposes of an audit of Gross Receipts and Operating Expenses, by Principal or its representatives. Agent agrees to cooperate in any such examination or inspection.

(4) Use its best efforts to make a profit.

(5) Correlate the operations of The Restaurant with any special events, promotions or programs conducted by Principal at Busch Gardens.

(6) Employ on a full-time basis, three (3) maintenance men to do minor maintenance necessary to the routine operation of The Restaurant and to perform routine cleaning tasks.

(7) On each following operating day, Agent will furnish to Principal a report of the Gross Receipts from the previous day.

Within three (3) weeks following the end of each month, and within three (3) weeks following the termination or expiration of this Agreement, Agent shall render to Principal a statement covering all operations performed hereunder. Such statements will include (i) a total of the Gross Receipts both for the previous month and for the cumulative period to date from the beginning of the Term Year, (ii) a total of the operating expenses both for the previous month and for the cumulative period to date from the beginning of the Term Year, and (iii) a profit and loss statement for The Restaurant both for the previous month and for the cumulative period to date from the beginning of the Term Year.

The final profit and loss statement for each term year shall be certified accurate by a Certified Public Accountant and all profit and loss statements shall be subject to audit by Principal, which audit must be performed within ~~a reasonable time~~ SIXTY DAYS after the statement is issued.

(b) Agent shall prepare a weekly list of repair and maintenance items and shall submit requests for work to be performed to the General Manager of Busch Gardens, Tampa. However, in emergency situations, Agent may proceed as circumstances warrant.

(c) Agent will provide the maintenance work for which it is made responsible by the provisions of paragraph VI. (d).

(d) All property and Equipment provided by Principal hereunder shall remain the property of Principal and Agent shall not sell, lease, pledge or otherwise encumber the Equipment.

IV. UNDERTAKINGS OF PRINCIPAL

(a) Principal agrees to make available to Agent, free of charge, the use of The Restaurant and the use of the Equipment therein during the term of this Agreement, and Principal agrees that Agent shall peaceably and quietly enjoy the use of The Restaurant and the use of the Equipment therein subject to the provisions of this Agreement for so long as Agent performs its obligations hereunder.

(b) Principal shall make all repairs and replacements and perform all maintenance for which Principal is obligated by the provisions of paragraph VI. (c) hereof.

(c) Principal shall maintain, repair and replace the flags in front of the Restaurant. Such costs shall not be included in Operating Expenses.

V. AGENT'S COMMISSION

For the services rendered hereunder, Agent shall receive Forty Thousand ($40,000) Dollars, payable in equal monthly installments for each Term Year. In the event that the management of The Restaurant for any Term Year shall result in a Net Operating Profit in excess of $50,000.00 for that Term Year, Principal shall pay Agent an additional sum equal to three percent (3%) of the net operating profit in excess of $50,000.00 in any term year. In the event that the Net Operating Profit in any Term Year shall exceed Two Hundred Thousand Dollars ($200,000.00), Principal shall pay Agent an additional sum equal to five per cent (5%) of the Net Operating Profit in excess of $200,000.00. Payment of this sum shall be made within ~~ninety (90)~~ Sixty (60) days of completion of the audit of The Restaurant profit and loss statement by Principal as set forth in paragraph III. (a) (i) (7) above.

Plaintiff's Exhibit 13

VI. MAINTENANCE

(a) Pursuant to the provisions of paragraph III. (b), Agent shall notify Principal of any and all necessary maintenance, repair or replacement work. The General Manager of Busch Gardens, Tampa, will then determine whether the work is to be performed and, if so, the proper party to perform. All maintenance, repair or replacement work will be done by either (i) maintenance men retained by Agent pursuant to the terms of paragraph III. (a) (i) (6) hereof, (ii) independent contractor(s), or (iii) Principal's personnel.

(b) The cost of all major maintenance, replacement and repair items is to be borne by Principal and is not to be included in Operating Expenses. It is the general intent of the parties that Principal will bear the expense of major maintenance work, including repair and replacement of capital equipment, and that minor or routine maintenance and cleaning costs will be charged to Operating Expenses.

(c) Without limiting the generality of the foregoing, those items to be borne directly by Principal include:

(i) The cost of maintaining the exterior of The Restaurant.

(ii) All direct and indirect labor charges or expenses related to maintenance, repair or replacement work performed in or on The Restaurant or Equipment by Principal's personnel.

(iii) The cost of all materials, supplies, parts and the like required for the repair, replacement or maintenance of Equipment and/or facilities within, or a part of, The Restaurant.

(iv) All labor and material costs incurred in connection with the utilization of outside contractors to perform repair and/or maintenance work in The Restaurant.

(d) Without limiting the generality of the foregoing, items which are to be charged as Operating Expenses include:

(i) All costs of labor, materials, supplies, and the like incurred for the cleaning of The Restaurant.

(ii) All direct and indirect labor charges or expenses related to the three (3) maintenance men employed by Agent pursuant to the provisions of paragraph III. (a) (i) (6) to repair and maintain the Equipment and/or facilities within, or a part of, The Restaurant.

(iii) The cost of all laundry and linen service and trash removal.

(iv) The cost of all utilities provided to The Restaurant.

VII. TERM

(a) The initial term of Agent's appointment to manage The Restaurant shall commence on June ~~22~~ 15, 1975, and terminate November 4, 1977. For purposes of this Agreement, "Term Year" shall mean the period beginning on June ~~22~~ 15 through and including the following June ~~21~~ 14.

(b) This Agreement shall be automatically renewed for an additional term of one (1) year, upon the same terms and conditions contained herein (with the exception of this automatic renewal provision), or as later amended, without further written instrument between the parties, unless either party shall give written notice to the other not less than ninety (90) days prior to the expiration of the initial term that the Agreement shall terminate at the end of the ~~initail~~ INITIAL term.

VIII. UTILITIES

Principal shall have the right to temporarily discontinue the supply

of all or any of the utilities services when reasonably necessary in making repairs, alterations, changes or improvements in The Restaurant or elsewhere.

IX. GOVERNMENTAL REQUIREMENTS

Agent shall observe and promptly execute the provisions of any and all present and future governmental laws, rules, regulations and other demands pertaining to its activities or occupancy hereunder.

X. TERMINATION

(a) Principal may at any time during the term of this Agreement, upon ten (10) days' written notice to Agent, terminate this Agreement upon the occurrence of any one or more of the following events:

(i) Agent shall become insolvent, take the benefit of any present or future insolvency statute, make a general assignment for the benefit of creditors, file a petition in bankruptcy or a petition or answer seeking an arrangement, reorganization or the readjustment of its indebtedness under the federal bankruptcy laws or any other similar federal or state law, be adjudged a bankrupt or consent to the appointment of a receiver, trustee, or liquidator of all or substantially all of its property; or

(ii) Agent shall be in default in the performance of any of the terms, covenants or conditions hereof to be performed, kept or observed by Agent, which such default Agent shall not have cured within ten (10) days after receipt of written notice thereof, or in the event such default is not capable of being cured within such ten-day period, which said default Agent shall not have commenced steps to cure within said period and thereafter diligently pursued same to completion.

(b) No waiver by Principal of any default on the part of Agent in performance of any of the terms, covenants or conditions hereof to be performed, kept or observed by Agent shall be or shall be construed to be a waiver by Principal of any other or subsequent default in performance of any of the said terms, covenants and conditions.

(c) Principal shall have the right to temporarily close to the public the Busch Gardens or any part thereof, including The Restaurant for any cause whatsoever; provided, however, that in such case Principal's obligation to pay Agent the commission established in Article V shall not cease or be in any way abated.

(d) In the event the performance of this Agreement by either party is prevented by laws, rules or regulations of any governmental body or agency, this Agreement shall terminate and no further duties shall be owing.

XI. INDEMNITY, LIABILITY AND INSURANCE

(a) Agent agrees to indemnify and hold Principal harmless from and against any and all cost or expense resulting from a claim, settlement, suit or action for personal injury (including death) or property damage suffered by any person, corporation or organization whatsoever, where such personal injury or property damage arose out of the negligent act or omission of Agent, its officer(s), agent(s), employee(s), invitee(s), contractor(s) or others doing business with it.

(b) Principal agrees to indemnify and hold Agent harmless from and against any and all cost or expense resulting from a claim, settlement, suit or action for personal injury (including death) or property damage suffered by any person, corporation or organization whatsoever, where such personal

injury or property damage arose out of the negligent act or omission of Principal, its officer(s), agent(s), employee(s), invitee(s), contractor(s) or others doing business with it.

(c) Principal shall procure and obtain for its account AND AT ITS OWN EXPENSE such insurance coverage as necessary with Agent named as co-insured where applicable (PARAGRAPH XI (a)), OK

(d) Agent shall indemnify and hold Principal harmless from and against any and all loss, cost or expense of all claims, demands, suits or settlements arising out of or resulting from any contract entered into by Agent on behalf of Principal, where the authority to enter into such a contract is not herein conferred on Agent.

XII. CASUALTY LOSS

It is expressly understood that should The Restaurant, or any part thereof, be damaged or destroyed by any cause whatsoever, Principal has the option of rebuilding, repairing, or replacing such property as has been damaged or destroyed, or of not rebuilding or replacing same, whichever is deemed more expedient, economical or desirable by Principal, provided however, that Principal shall not be relieved of its obligation to Agent to pay the Agent's commission specified in paragraph V during the remainder of the INITIAL term hereof, OR ANY RENEWAL THEREOF. OK

XIII. NOTICES

All notices (including but not limited to designations, notifications and reports) given or required to be given to or by either party shall be in writing and all such notices shall be forwarded by registered or certified mail to the addresses set forth on the first page of this Agreement or to such other addresses as either party may notify the other by certified or

registered mail. Notices to Principal shall be to the attention of Mr. William H. Thurman, General Manager Busch Gardens, or his successor, and notice to Agent shall be to the attention of Mr. Sidney Sherman, President, or his successor.

XIV. ASSIGNMENT

Because Agent's services hereunder are of a unique and personal nature, Agent shall not assign, sell, convey, transfer, mortgage or pledge this Agreement. Provided, however, that should Agent elect to incorporate his business, this Agreement may be assigned to said corporation with the written approval of Principal.

XV. AMENDMENT AND INTERPRETATION

(a) This Agreement may be amended only by an instrument in writing signed by the party against whom enforcement of such amendment may be sought.

(b) This Agreement shall be governed by and interpreted in accordance with the laws of the State of Florida.

XVI. NON-WAIVER OF RIGHTS

No waiver by Principal of any default on the part of Agent in performance of any of the terms, covenants or conditions hereof to be performed, kept or observed by Agent shall be or shall be construed to be a waiver by Principal of any other or subsequent default in performance of any of the said terms, covenants and conditions.

XVII. HEADINGS

The paragraph headings, if any, are inserted herein only for convenience and for reference, and in no way define, limit or otherwise describe the scope or intent of any provision hereof.

XVIII. PRIOR APPROVAL OF SUCCESSOR

It is understood that this is a personal services agreement and that the participation of Agent is vital to both parties. Therefore, in the event that (1) Agent should become incapacitated and unable to perform the services herein agreed, and thereby be required to hire an employee to perform in his stead, or (2) Agent should elect to sell his enterprise to some third party, any such transfer of interest, control or functional responsibility shall be subject to the prior written approval of Principal.

XIX. AGREEMENT NOT TO COMPETE

Agent will not operate a restaurant or in any other way compete with or aid a competitor of, Principal within a radius of 20 miles of the Restaurant during the term of this agreement.

XX. SUBSEQUENT ILLEGALITY

This Agreement is conditioned upon the approval of Federal and State (Florida) liquor control authorities, and any rule or regulation of those authorities which significantly impairs this Agreement shall be cause for immediate termination of this Agreement by Principal.

A 492

Plaintiff's Exhibit 13

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement to be duly executed the day and year first above written by a person duly authorized.

SHERMAN MANAGEMENT CORPORATION

MR. SIDNEY SHERMAN

By Sidney Sherman

May 20 1975

Date

ANHEUSER-BUSCH, INCORPORATED

By Louis G. Cory

VICE. PRESIDENT

Title

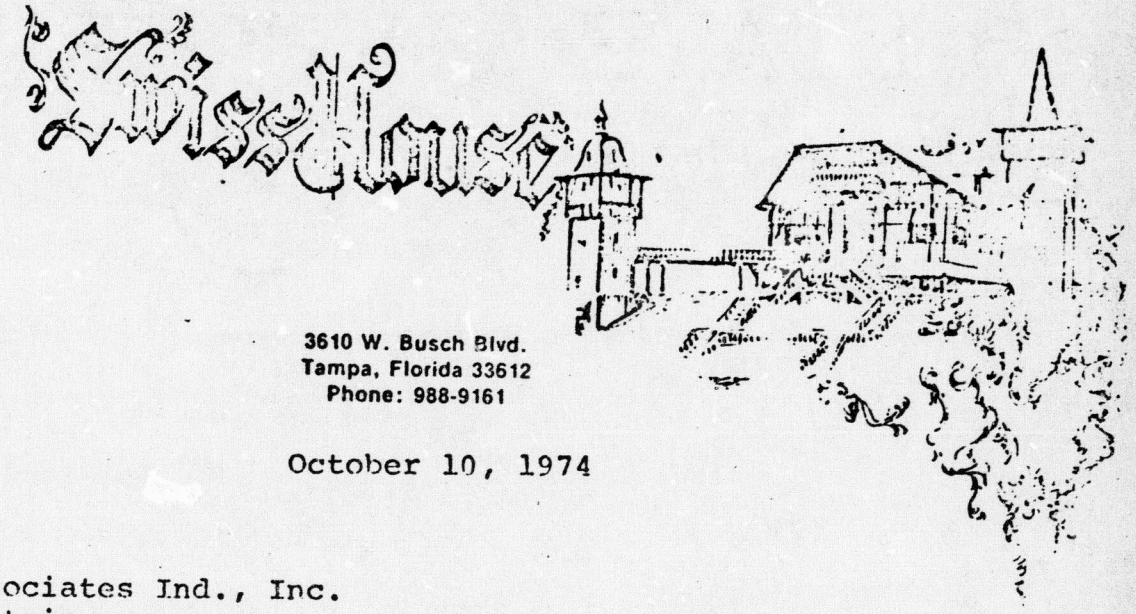
May 30, 1975

Date

A 493

PLAINTIFF'S EXHIBIT 14

LETTER DATED OCTOBER 10, 1974 FROM SIDNEY SHERMAN
TO RESTAURANT ASSOCIATES INDUSTRIES, INC.



3610 W. Busch Blvd.
Tampa, Florida 33612
Phone: 988-9161

October 10, 1974

Restaurant Associates Ind., Inc.
Miss Lee Bernstein
1540 Broadway
New York, New York 10036

Dear Lee:

Regarding our new contract at Busch Gardens, I feel it should include a statement on behalf of Anheuser-Busch that they promise not to open a sit down, indoor service type restaurant or coffee shop in any area of the Gardens that would prove to be of a competitive nature to the Old Swiss House.

This is not in their plans at the present time, but they might come up with the idea sometime in the future, and this could prove costly to us.

Sincerely,

Sidney Sherman

Sidney Sherman
Director of Operations

cc: Mr. Ralph Tolve

SS/sc

11-3-74

A 494

PLAINTIFF'S EXHIBIT 17

CERTIFICATE OF INCORPORATION OF SHERMAN MANAGEMENT CORPORATION, INC.

STATE OF FLORIDA

DEPARTMENT OF STATE

I certify that the following is a true and correct copy of

CERTIFICATE OF INCORPORATION

OF

SHERMAN MANAGEMENT CORPORATION, INC.

filed in this office on the 30th day of May

1975.

Charter Number: 477059

GIVEN under my hand and the Great Seal of the State of Florida, at Tallahassee, the Capital, this the 7th day of July

19 75.

Bruce A. Smathers

SECRETARY OF STATE

Corp-94
Revised 1-20-75

A 495

Plaintiff's Exhibit 17

FILED
Mar 30 10 04 AM '75
SECRETARY OF STATE
TALLAHASSEE, FLORIDA

CERTIFICATE DESIGNATING PLACE OF BUSINESS OR DOMICILE FOR THE SERVICE OF PROCESS WITHIN THIS STATE, AND NAMING AGENT UPON WHOM PROCESS MAY BE SERVED

Pursuant to Chapter 48.091, Florida Statutes, the following is submitted, in compliance with said Act:

SHERMAN MANAGEMENT CORPORATION, INC., desiring to organize under the laws of the State of Florida, with its principal office, as indicated in its Articles of Incorporation, at the City of Temple Terrace, County of Hillsborough, State of Florida, has named Sidney Sherman, located at 209 Tanglewood Place, Temple Terrace, Florida, as its agent to accept service of process within this state.

ACKNOWLEDGMENT

Having been named to accept service of process for the above stated corporation, at the place designated in this certificate, I hereby accept to act in this capacity, and agree to comply with the provision of said Act relative to keeping open said office.

Sidney Sherman

Sidney Sherman, Resident Agent

A 496

Plaintiff's Exhibit 17

FILED

MAY 30 10 04 AM '75

SECRETARY OF STATE
TALLAHASSEE, FLORIDA

ARTICLES OF INCORPORATION

OF

SHERMAN MANAGEMENT CORPORATION, INC.

We, the undersigned incorporators, hereby associate ourselves together and make, subscribe, acknowledge and file with the Secretary of State of the State of Florida these Articles of Incorporation, for the purpose of forming a corporation for profit in accordance with the laws of the State of Florida.

ARTICLE I

Name

The name of this corporation shall be:

SHERMAN MANAGEMENT CORPORATION, INC.

ARTICLE II

Business, Objects or Purposes

The general nature of the business to be transacted by this corporation, or the objects or purposes of the corporation, shall be to manage and conduct restaurant operations, including beverages, and to retain, hire and employ persons in connection therewith, and to contract to render such services to others and to act as a consultant with respect to any of the above.

The corporation may engage in any activity or business permitted under the laws of the United States and of the State of Florida.

Plaintiff's Exhibit 17

ARTICLE III

Capital Stock

The total number of shares of capital stock authorized to be issued by the corporation shall be 100 shares, having a par value of $10.00 per share. Each of the said shares of stock shall entitle the holder thereof to one vote at any meeting of the stockholders. All or any part of said capital stock may be paid for in cash, in property or in labor or services at a fair valuation to be fixed by the Board of Directors at a meeting called for such purpose. All stock when issued shall be paid for and shall be nonassessable.

In the election of directors of this corporation there shall be no cumulative voting of the stock entitled to vote at such election.

The holders of the stock of the corporation shall have the preemptive right to subscribe for and purchase their proportionate share of any additional stock issued by the corporation from and after the issuance of the shares originally subscribed for by the stockholders of this corporation, whether such additional shares be issued for cash, property, services or any other consideration, and whether or not such shares be presently authorized or be authorized by subsequent amendment to these Articles of Incorporation.

ARTICLE IV

Capital to Begin Business

The amount of capital with which this corporation will begin business will be $500.00.

Plaintiff's Exhibit 17

ARTICLE V

Existence of Corporation

The corporation shall have perpetual existence.

ARTICLE VI

Principal Office

The principal office of this corporation shall be located at 209 Tanglewood Place, Temple Terrace, Florida, but the corporation shall have the power to relocate its principal office or to establish branch offices at other places within or without the State of Florida as may be determined and deemed expedient.

ARTICLE VII

Board of Directors

There shall be a Board of Directors for this corporation which shall consist of not less than one and not more than fifteen (15) members, the number of the same to be fixed by the stockholders or by the corporate by-laws. Each of the said directors shall be of full age and at least one of them shall be a citizen of the United States. A quorum for the transaction of business shall a majority of the directors qualified and active, and the act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the directors. Subject to the by-laws of this corporation, meetings of the directors may be held within or without the State of Florida. Directors need not be stockholders. The stockholders of this corporation may remove any director from office at any time with or without cause.

A 499

Plaintiff's Exhibit 17

ARTICLE VIII

First Board of Directors

The names and street addresses of the members of the first Board of Directors of this corporation, who, subject to these Articles of Incorporation, the by-laws of this corporation, and the laws of the State of Florida, shall hold office for the first year of the existence of this corporation, or until an election is held by the stockholders for the election of permanent directors, or until their successors have been duly elected and qualified, are:

Sidney Sherman	209 Tanglewood Place Temple Terrace, Florida
Shirley Sherman	209 Tanglewood Place Temple Terrace, Florida

ARTICLE IX

Subscribers

The names and street addresses of the subscribers to these Articles of Incorporation are:

Sidney Sherman	209 Tanglewood Place Temple Terrace, Florida
Shirley Sherman	209 Tanglewood Place Temple Terrace, Florida

ARTICLE X

Transactions with Corporations

No contract or other transaction between this corporation and any other corporation, and no other contract or transaction of this corporation, shall in any way be affected or

invalidated by the fact that any of the directors of this corporation are pecuniarily or otherwise interested in any other corporation. Any director individually, or any firm of which any director may be a member, may be a party to, or may be pecuniarily or otherwise interested in, any contract or transaction of this corporation, provided that the fact that he or such firm is so interested shall be disclosed or shall have been known to the Board of Directors. Any director of this corporation who is also a director or officer of such other corporation or member of such firm, or who is so interested, may be counted in determining the existence of a quorum at any meeting of the Board of Directors of this corporation which shall authorize any such contract or transaction, with like force and effect as if he were not such officer or director of such other corporation or member of such firm, or not so interested.

ARTICLE XI

By-Laws

The power to adopt the by-laws of this corporation, to alter, amend or repeal the by-laws, or to adopt new by-laws, shall be vested in the Board of Directors of this corporation; provided, however, that any by-law or amendment thereto as adopted by the Board of Directors may be altered, amended or repealed by vote of the stockholders entitled to vote thereon, or a new by-law in lieu thereof may be adopted by vote of the stockholders. No by-law which has been altered, amended or adopted by such vote of the stockholders may be altered, amended

or repealed by vote of the directors until two years shall have expired since such action by vote of such stockholders.

The by-laws of this corporation shall be for the government of the corporation and may contain any provisions or requirements for the management or conduct of the affairs and business of the corporation, provided the same are not inconsistent with the provisions of these Articles of Incorporation, or contrary to the laws of this State or of the United States.

ARTICLE XII

Amendment of Articles of Incorporation

The corporation reserves the right to amend, alter, change or repeal any provision contained in these Articles of Incorporation in the manner now or hereafter prescribed by statute, and all rights conferred upon the stockholders herein are subject to this reservation.

IN WITNESS WHEREOF, we, the undersigned, have executed these Articles of Incorporation for the uses and purposes therein stated.

Sidney Sherman
Sidney Sherman

Shirley Sherman
Shirley Sherman

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

BEFORE ME, the undersigned authority, this day personally appeared Sidney Sherman and Shirley Sherman, to me well kn

A 502

Plaintiff's Exhibit 17

be the persons described in and who signed the foregoing Articles of Incorporation, and acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein expressed.

WITNESS my hand and official seal the 15th day of May, 1975.

Sara M. Deaver

Notary Public, State of Florida

My commission expires:

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES APR 25, 1978
BONDED THRU GENERAL INSURANCE UNDERWRITERS

A 503

DEFENDANT'S EXHIBIT A

LETTER DATED SEPTEMBER 24, 1973 FROM DENNIS P. LONG TO RESTAURANT ASSOCIATES, INC. TOGETHER WITH ENVELOPE

SEP 27 1973

ANHEUSER-BUSCH, INC
EXECUTIVE OFFICES
ST. LOUIS, MO., U.S.A. 63118

September 24, 1973

Restaurant Associates, Inc.
1540 Broadway
New York, New York 10036

ATTENTION: Mr. Ralph Tolve, Vice President

Dear Ralph:

Please be advised that Anheuser-Busch, Incorporated, desires to renegotiate certain terms of the management agreement which is scheduled to terminate December 25, 1973. This notice is being sent in compliance with the requirements of Paragraph 4(b) of the management agreement.

I have asked Mr. James R. Bickle to contact you shortly in an effort to conclude negotiations with representatives of your company as soon as possible.

Very truly yours,

Dennis P. Long

Dennis P. Long
Vice President

DPL:kw

cc: Messrs. J. R. Bickle
R. A. Schwartz

Keep America Beautiful

ANHEUSER-BUSCH, INC.

ST. LOUIS, MISSOURI 63118

VISIT Busch GARDENS LOS ANGELES / LAWA

SAINT LOUIS SEP 25 73 A10

VIA AIR MAIL

Mr. Ralph Tolve, Vice President
Restaurant Associates, Inc.
1540 Broadway
New York, New York 10036

Defendant's Exhibit A

A-504

A 505

DEFENDANT'S EXHIBIT B

LETTER DATED JANUARY 28, 1974 FROM JAMES R. BICKLE TO MR. VERNE CLEMENTS TOGETHER WITH FIVE (5) PAGE PROPOSED DRAFT OF AN AGREEMENT BETWEEN ANHEUSER-BUSCH INCORPORATED AND RESTAURANT ASSOCIATES INDUSTRIES, INC.

January 28, 1974

Mr. Verne Clements
Restaurant Associates Industries, Inc.
Miamarina Restaurant
301 N.E. Miamarina Parkway Drive
Miami, Florida 33132

Dear Verne:

Please note the attached rough draft of an Amendment to our Tampa contract spelling out the items we had agreed upon previously. Did you want to communicate with Ralph Tolve or should Denny contact him directly?

Also, if you have any questions regarding this Amendment, please give me a buzz.

Yours truly,

James R. Bickle
Director of Merchandising
Corporate Affairs Division

J B:DV

Attachment

A 506

Defendant's Exhibit B

AMENDMENT TO AGREEMENT

THIS AMENDMENT dated _____, 1974, but effective as of January 1, 1974, by and between ANHEUSER-BUSCH, INCORPORATED, a Missouri corporation, with principal offices at 721 Pestalozzi Street, St. Louis, Missouri ("Busch") and RESTAURANT ASSOCIATES INDUSTRIES, INC., a Delaware corporation, with principal offices at 1540 Broadway, New York, New York ("Associates")

PREAMBLE

Busch and Associates entered into an Agreement ("Agreement") dated December 8, 1972, but effective as of December 26, 1971. relating to Associates' management of the food and beverage service areas (referred to as "Areas Furnished" in the Agreement and this Amendment). Said Agreement was for a term of two (2) years with provision for automatic renewal for an additional one (1) year term unless notification of termination was sent within the time prescribed in the Agreement.

Busch gave Associates timely notice of its intent to terminate the Agreement on December 25, 1973 if it could not renegotiate certain terms of the Agreement. To this end, Busch and Associates have renegotiated certain terms as requested by Busch, as well as certain terms as requested by Associates.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties agree that the Agreement is amended as follows:

1. Section 1 (d)(iii) is deleted in its entirety and the following inserted in lieu thereof:

"(iii) Subject to the provisions of Section 3 (b) and Section 7, cost of all maintenance (janitorial or otherwise), replacement and repair items are to be borne either by Busch or included in Operating Expenses. Those items to be borne directly by Busch are as follows:

(a) Exteriors of all food and beverages facilities in Areas Furnished.

(b) All replacements of equipment or facilities in the Areas Furnished as deemed necessary by Busch.

(c) All direct and indirect labor charges or expenses related to work performed by Busch's brewery employees.

(d) All materials, supplies, parts, etc. required for the repair and maintenance of equipment and/or facilities within, or a part of, the Areas Furnished.

(e) All labor and material costs in connection with the utilization of outside contractors to perform repair and/or maintenance work in the Areas Furnished.

(f) All costs for repair and/or maintenance service contracts in connection with the Areas Furnished.

Items to be charged as Operating Expenses under this subparagraph (iii) are as follows:

(a) The cost of labor, materials, supplies, etc. for all cleaning of the Areas Furnished and areas

referred to in Section 3 (b)(iv).

(b) All direct and indirect labor charges or expenses related to the three (3) maintenance men employed by Associates to repair and maintain the equipment and/or facilities within, or a part of, the Areas Furnished as required by Section 3 (b).

(c) The cost of all laundry and linen service and trash removal.

(d) The cost of all utilities in the Areas Furnished."

2. That portion of Section 1 (d)(v) following the word "plus" in the sixth line of this subparagraph shall be deleted in its entirety and the following inserted in lieu thereof:

"(2) with respect to the Business at the snack bars, juice bars, pretzel stand, food carts and all other food and beverage operations excluding (1) above, thirty-five per cent (35%) of the aggregate daily Gross Receipts therefrom."

3. Section 4 (a) is hereby amended by adding the following sentence:

"The initial term of this Agreement scheduled to have terminated on December 25, 1973 is extended for an additional term ending on November 4, 1974 which period (December 25, 1973 through November 4, 1974) shall be considered to be a "Term Year" for purposes of this Agreement."

4. Section 10 (c) is hereby deleted in its entirety and the following inserted in lieu thereof:

"(c) Busch shall have the right to temporarily close to the public the Busch Gardens or any part thereof, including all or any part of the Areas Furnished for any cause whatsoever; provided, however, if that portion of the Areas Furnished known as the Old Swiss House is closed by Busch for a period of more than three consecutive days, then Busch agrees to reimburse Associates for substantiated fixed labor costs (excluding pre-scheduled vacations) which Associates incurs with respect to its employees regularly employed in the Old Swiss House who cannot be transferred by Associates to a productive capacity at another portion of the Areas Furnished. This obligation for reimbursement shall extend only from the 4th consecutive day of such closing through the 10th consecutive day regardless of the ultimate length of such continuous closing. No such obligation for reimbursement shall exist with regard to the closing of any other portion of the Areas Furnished. Busch also agrees to give Associates at least thirty (30) days' prior written notice if Busch plans modifications to all or a portion of the Busch Gardens or the Areas Furnished which will require closing of all or a portion of the Areas Furnished."

5. To the extent not modified by this Amendment, all other provisions of the Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be executed and their corporate seals hereto affixed as of the day and year first above written.

ANHEUSER-BUSCH, INCORPORATED

Attest:

By _____
Vice President

_____
Secretary

RESTAURANT ASSOCIATES INDUSTRIES, I

Attest:

By _____
Vice President

_____
(Assistant) Secretary

A 511

PLAINTIFF'S EXHIBIT 19

MEMO DATED JUNE 20 FROM JAMES R. BICKLE TO DENNIS P. LONG

From The Desk Of:
JAMES R. BICKLE

Denny 6/20

Due to several factors it appears that it will be mine and Joe Fincers recommendations that we retain the OHS and RA management for the present, with a guarantee that Sid Sherman be retained as manager. This would simplify a great many problems in our upcoming takeover of the snack stands -- I will spell out the whole case to you in writing next week.

Jim

Busch Gardens

A 512

PLAINTIFF'S EXHIBIT 20

MEMO TO FILE DATED MAY 17, 1973 FROM DENNIS P. LONG

MEMO TO FILE

Subject: Minutes - Meeting R.A. - Old Swiss House - 9:05 a.m. - May 17, 1973

In Attendance: A. Restaurant Associates

R. Tolve, V. Clements, A. Anderson

B. Anheuser-Busch

D. Long, H. Greenblatt, J. Bickle, H. Koenig, R. Bates

Purpose:

A. To discuss previous complaint letters from D. Long to Tolve and Anderson.

B. To determine dollars owed A-B by R.A.

C. To discuss retirement of A. Anderson (per R. Tolve)

D. To discuss man power changes

Comments:

A. R. Tolve handed D. Long signed contract on 5/17 at 9:05 a.m. (It's taken me almost a year to get them to sign the contract...even though they have not suggested a single change since I sent them the signed contract).

B. Tolve commented that they were losing money on the in-park operation and wanted out...because they were paying us too much money.

Long stated that we wanted the in-park food - had told them so five to six months ago...and could not understand what took them so long to respond to our request. I went on to say that our reason for wanting the in-park food operation was primarily because of the poor quality of the food served by R.A....and the lack of service. Noting that there were too few people working in the stands.

A. Anderson said that he agreed that there were not enough people there - but he had a profit responsibility and food costs were increasing at a rapid rate. He stated that he had asked for a price increase, in-park some time ago and had not received permission from A-B.

Long stated that he remembered the request - it came at the same time Anderson had requested a price increase in the OSH. We had granted the OSH increase - but asked him (at that time) to provide more information on our competitor. We had not received such information...so we could not make a decision.

Comments:

V. Clements advised that he would provide such...and I assured him that I would, based on that information, give him an immediate response. But I also stated that they were obligated to provide us a quality of food and service that was up to A-B standards. At that point, I stated to Tolve that I had read R.A.'s corporate year end report and it should that R.A. was losing a good deal of money. I advised him that I sincerely felt that they were cutting back on their quality of food and service at the Gardens, in an effort to offset their losses on the East Coast...and. that we did not think that was in the spirit and letter of the Agreement.

Tolve conceded that they were indeed losing money... (Anderson interrupted to say that he had a responsibility to make a "return" on the account...and that's why he was reinstated after he had retired)...but they were not cutting back on the Busch Gardens account. He said that the reason they were losing money was because of the complete collapse of the East Coast market.

I asked Tolve if he had eaten the food in the park (he nodded negatively and I told him I had a month ago and the buns were stale and the sandwich was not palatable. In fact, I told him that our employees would not eat in the Gardens, but went outside to get sandwiches from a hamburger shop...and it was a "joke" around the office that our food was very bad. Surely, that's not the kind of image A-B wanted for any of its operations. That was why we wanted the in-park operations as soon as possible.

Tolve stated that the employees' comments were because of their constant exposure to the Gardens food...but he would check on the complaint. He asked A. Anderson about the stale buns.

Anderson said the buns were baked daily at the OSH...and couldn't be stale...and stated that they may be a (I missed the particular type of bun)...but the plaster has been loose on the bake shop ceiling for two years and he has been complaining about it. (Frankly, I don't understand the relationship...and Tolve didn't seem to either, because he reiterated that he would check it out).

C. At this point, Tolve introduced the fact that they had been having employee problems at the Swiss House. He stated they had changed chefs several times - they had trouble with their waitresses and kitchen help.

Anderson interrupted that he had trouble with the waitresses - he reminded me of my letter which said that the captains were insensitive to customers and said that was the kind of troubles he had - he said his particular problem was with maintenance people...in that they were low skilled and unreliable. He stated that he couldn't agree more, that the OSH had fallen into a state of disrepair and it "hurt his professional pride" to see it happen - but he couldn't get proper help.

Tolve interrupted...and asked about George Frey(a former chef) whom they had fired. Tolve said that he (Frey) was on the East Coast saying that he was being sent to college by Mrs. Busch - and that R.A. was on their way out at the OSH.

I stated that I had talked to Frey...listened to his complaints on the OSH management...and that I had no knowledge of any commitments made by Mrs. Busch.

Anderson asked if I knew that Fry was arrested on the night of Mr. Busch, Jr's. birthday party - had left his apartment without paying - had thrown a spoon at one of the waitresses.

I said I did not know that...but I didn't understand the relevance.

D. Tolve reopened the in-park discussion by saying that they would phase their in-park union people into the Swiss House - so we could take over the operations - while they acted as a consultant to us. However, he warned us that he still felt that they could do a better job than us - if the share of gross they paid us was lower.

I told them we could not move immediately on any long-range suggestion regarding R.A. because we wanted to reevaluate our entire long-range relationship

E. I then asked about the complaints we had received on the OSH...and the fact that we were not happy with the way it was being run. I stated that we were losing money on the OSH...but equally as important, the image of Busch Gardens and Anheuser-Busch was being tarnished... for we felt that whomever operated our services, the consumer felt that it was Busch Gardens.

Tolve stated that:

- They were changing people

- They were initiating a training program.

I asked them about the poor maintenance.

Tolve stated that he wanted to clear that up - and while they agreed to day-to-day maintenance, they had a $30,000 per year upper limit on spendings - as agreed with R. Bender. He said they had spent $30,000 in 1972 and that our billing to them for $20,000 was not correct - because they had spent the $30,000.

H. Koenig and R. Bates said they had no knowledge of any expenditures by R.A.

V. Clements said he would show them the spendings immediately after this meeting so we could resolve the matter once and for all.

I stated that we could no longer suffer through such indecision as to who was responsible for keeping the Swiss House up to A-B quality and from here - to the end of this contract - we (Busch Gardens) would be responsible for all maintenance other than very minor repairs. Harold Greenblatt was responsible for such a maintenance program.

We discussed the air-conditioning cover...R.A. agreed to pay.

We discussed the buffet shield...A-B agreed to pay.

We discussed the Spurlow preview bill...and I said we would pay.

F. I suggested a clear definition of communications from here to the end of the contract stating that the previous delegation of H. Greenblatt as overall coordinator was now rescinded and that Jim Bickle and Vern Clements would now have primary contact - including the request for in-park price increase.

Greenblatt stated that he had done a "walk-through with A. Anderson the day before and they agreed on certain repairs that were needed - and Greenblatt handed me a report on the walk-through.

G. Tolve asked if we would renegotiate the contract on the OSH now. I told him we had just received the news that the Tampa hotel would be under my jurisdiction and that situation required a closer look at our overall association with R.A. - and that I had to review the situation in detail before I changed a thing.

Tolve said that Jim Bickle had told him of the hotel change...and that he understood my position.

H. Tolve said he wanted to reiterate what he told me on the phone...Andy Anderson was retiring.

I purposely avoided any agreement that Anderson should or should not retire. Instead I asked when.

I. The meeting ended at 11:15.

DPL

A 517

Plaintiff's Exhibit 20

From The Desk Of:
ROGER A. BATES

5-24-73

Re... to R. Schwartz

Lenny

The attached summary of our meeting with Restaurant Associates represents the "meat" of that meeting.

You + I are the only ones that have copies and I don't think too many should be distributed because it contains plans that at this time should not be revealed.

J Roger

Busch Gardens

A 518

PLAINTIFF'S EXHIBIT 22

MEMORANDUM DATED AUGUST 8, 1973 FROM W. RANDOLPH BAKER TO RICHARD SCHWARTZ, TOGETHER WITH SIX (6) PAGE MEMORANDUM

From the desk of —

W. RANDOLPH BAKER

8/8/73

Rich -

Attached is my rewrite of Denny's memo to August concerning the Tampa situation.

I would appreciate your comments.

Randy

att.

A 519

Plaintiff's Exhibit 22

THREE INTERRELATED ANALYSES ARE PRESENTLY UNDERWAY:

- THE FEASIBILITY OF A-B BUILDING A MOTEL ADJACENT TO THE OLD SWISS HOUSE IN THE TAMP GARDENS
- THE REMOVAL OF RESTAURANT ASSOCIATES AS OPERATOR OF THE OLD SWISS HOUSE
- A TAKEOVER OF THE IN-PARK FOOD SERVICE BY CORPORATE AFFAIRS

THESE THREE ARE INTERRELATED BECAUSE:

- R.A. IS A UNION OPERATOR AND MARRIOTT - WHO WE WOULD SELECT TO RUN THE SWISS HOUSE AND THE HOTEL - IS NOT
- R.A. HAS UNION EMPLOYEES IN-PARK, WHO SHOULD BE REMOVED BEFORE WE TAKE OVER.

A 520

Plaintiff's Exhibit 22

LABOR SITUATION

ANHEUSER-BUSCH'S CONTRACT WITH RESTAURANT ASSOCIATES EXPIRES DECEMBER 26, 1973 ... WITH A 90-DAY NOTIFICATION CLAUSE ... SO WE MUST NOTIFY RESTAURANT ASSOCIATES BY SEPTEMBER 25. HOWEVER, RESTAURANT ASSOCIATES' LABOR AGREEMENT WITH THE UNION DOES NOT EXPIRE UNTIL NOVEMBER 4, 1974.

OUR CONTRACT WITH RESTAURANT ASSOCIATES IS SUCH THAT ANHEUSER-BUSCH IS PRINICPAL AND RESTAURANT ASSOCIATES IS OUR AGENT ... AND AS A RESULT WE MAY BE CONSIDERED JOINT EMPLOYERS. IF WE TERMINATE OUR CONTRACT WITH RESTAURANT ASSOCIATES, ANHEUSER-BUSCH COULD BE HELD LIABLE TO FULFILL THE UNEXPIRED ELEVEN MONTHS OF THE RESTAURANT ASSOCIATES LABOR AGREEMENT. IF ANHEUSER-BUSCH OR MARRIOTT ATTEMPTS TO REMOVE THE UNION, THE UNION MIGHT PICKET THE BREWERY ... AND ANHEUSER-BUSCH PROBABLY COULD NOT OBTAIN AN INJUNCTION AGAINST THE PICKETS.

A 521

Plaintiff's Exhibit 22

LIQUOR LICENSE TRANSFER

IN ORDER TO ESTABLISH BEFORE THE NLRB THAT OUR SOLE PURPOSE IN REMOVING RESTAURANT ASSOCIATES IS NOT TO REMOVE THE UNION, A DISTINCT CHANGE SHOULD BE MADE IN THE METHOD OF DOING BUSINESS AT THE SWISS HOUSE. THE RISK OF RESTAURANT UNION ACTION AGAINST ANHEUSER-BUSCH WOULD BE LESSENED IF ANHEUSER-BUSCH COULD TRANSFER ITS LIQUOR LICENSE TO THE OPERATOR OF THE SWISS HOUSE, MARRIOTT, THEREBY REMOVING ANHEUSER-BUSCH FROM THE PRINCIPAL/AGENT RELATIONSHIP.

IT IS THE OPINION OF OUR LEGAL DEPARTMENT AND T. PAINE KELLY THAT THE ONLY POSSIBLE WAY WE MIGHT BE ABLE TO TRANSFER THE LIQUOR LICENSE IS UNDER A LONG TERM LEASE ... WHEREBY WE LOSE CONTROL OF THE OPERATIONS AND RECEIVE A RENT INSTEAD OF SHARING IN THE PROFITS. SINCE THIS TYPE OF ARRANGEMENT WOULD NOT BE ATTRACTIVE TO ANHEUSER-BUSCH, IN ESSENCE ANHEUSER-BUSCH MUST HAVE A PRINCIPAL/AGENT RELATIONSHIP WITH THE SWISS HOUSE OPERATOR ... AND CONSEQUENTLY BE SUSCEPTIBLE TO UNION ACTION AGAINST US AS A JOINT EMPLOYER.

A 522

Plaintiff's Exhibit 22

TAMPA HOTEL

PRELIMINARY ECONOMIC ANALYSIS INDICATES THAT THE HOTEL INVESTMENT WOULD PROVIDE A DCFROI OF CLOSE TO 10 PERCENT ... BASED UPON PRELIMINARY REVENUE AND OPERATING COST INPUTS FROM MARRIOTT, AND OUR PRELIMINARY MARKET ANALYSIS. WE WILL NEED MORE DEFINITE INPUTS FROM MARRIOTT ON DESIGN, CAPITAL COSTS, MARKET POTENTIAL, AND THE FINAL OPERATING AGREEMENT TO COMPLETE THE FINAL ANALYSIS. HOWEVER, MARRIOTT IS WITHHOLDING THESE INPUTS UNTIL THE WILLIAMSBURG AGREEMENT IS CONSUMMATED.

IT SHOULD TAKE MARRIOTT ABOUT ONE MONTH TO DEVELOP THE INFORMATION NEEDED FOR OUR ANALYSIS ... AND THEREFORE WE CANNOT HAVE A FIRM DECISION ON THE HOTEL BY THE SEPTEMBER 25 NOTIFICATION DATE FOR RESTAURANT ASSOCIATES ... AND MARRIOTT DOES NOT WANT THE SWISS HOUSE UNLESS THERE IS TO BE A HOTEL. IF MARRIOTT WERE TO START THEIR WORK ON THE HOTEL ANALYSIS BY OCTOBER 1, 1973, WE COULD BE READY FOR A RECOMMENDATION BY DECEMBER 1973.

A 523

Plaintiff's Exhibit 22

IN-PARK FOOD SERVICE

AS AN INTERIM STEP, A POSSIBILITY EXISTS TO NEGOTIATE TO HAVE RESTAURANT ASSOCIATES RELINQUISH THE IN-PARK FOOD SERVICE ON DECEMBER 26, 1973 ... AND REPLACE RESTAURANT ASSOCIATES IN-PARK WITH A CORPORATION HEADED BY BURL PURVIS ... WHO WAS FOOD AND BEVERAGE MANAGER AT HOUSTON AND HAS BEEN PRESIDENT OF SEVERAL SMALL FOOD SERVICE COMPANIES.

SINCE THE LIQUOR LICENSE DOES NOT EXTEND TO THE IN-PARK CONCESSIONS, OUR AGREEMENT WITH PURVIS COULD BE AS PRINCIPAL AND INDEPENDENT CONTRACTOR ... THEREBY AVOIDING THE JOINT EMPLOYER PROBLEM. PURVIS, AS SUCCESSOR TO RESTAURANT ASSOCIATES, WOULD HONOR THE UNEXPIRED ELEVEN MONTHS OF THE EXISTING LABOR AGREEMENT BETWEEN RESTAURANT ASSOCIATES AND THE IN-PARK UNION EMPLOYEES.

A 524

Plaintiff's Exhibit 22

BECAUSE OF THE INTERRELATED PROBLEMS OF THE HOTEL DECISION, THE RESTAURANT ASSOCIATES UNION, AND THE LIQUOR LICENSE, IT WILL BE DIFFICULT TO REMOVE RESTAURANT ASSOCIATES BY GIVING NOTICE ON SEPTEMBER 25, 1973 AND BE READY TO EFFECT OVER PLANS FOR THE HOTEL, SWISS HOUSE, AND IN-PARK FOOD SERVICE.

WE HAVE THREE BASIC ALTERNATIVES:

1. REMOVE RESTAURANT ASSOCIATES BY GIVING NOTICE ON SEPTEMBER 25 ... AND REPLACE RESTAURANT ASSOCIATES IN THE SWISS HOUSE WITH A RESTAURANT OPERATOR WHO WILL ASSUME THE UNEXPIRED ELEVEN MONTHS OF THE LABOR AGREEMENT
2. REMOVE RESTAURANT ASSOCIATES BY GIVING NOTICE ON SEPTEMBER 25 ... WORK UNDER THE ASSUMPTION THAT THE HOTEL WILL BE A "GO" DECISION ... TAKE OUR CHANCES WITH POSSIBLE LABOR PROBLEMS ... AND HAVE MARRIOTT OPERATE THE SWISS HOUSE AFTER DECEMBER 26 IF THE HOTEL AGREEMENT IS SIGNED
3. EXTEND THE CONTRACT WITH RESTAURANT ASSOCIATES THROUGH NOVEMBER 4, 1974 (WHEN ITS LABOR AGREEMENT WITH THE UNION EXPIRES) ... AND PERHAPS ARRANGE TO HAVE BURL PURVIS TAKEOVER IN-PARK FOOD SERVICE. THIS ALTERNATIVE WOULD GIVE US TIME TO MAKE A MORE THOROUGH ANALYSIS OF THE HOTEL FEASIBILITY AND THE LABOR AND LIQUOR LICENSE PROBLEMS.

A 525

PLAINTIFF'S EXHIBT 23

LETTER DATED SEPTEMBER 17, 1973 FROM JAMES R. BICKLE
TO MR. VERNE CLEMENTS

EXECUTIVE OFFICES
ST. LOUIS, MO., U.S.A. 63118

September 17, 1973

Pltf's Exhibit 23 For Identification
2-23-79 Donna A. Metz

Mr. Verne Clements, Vice President
Restaurant Associates Industries, Inc.
301 N.E. Miamarina Parkway Drive
Miami, Florida 33132

Dear Verne:

As per my previous discussions with you, there are some points within the Restaurant Associates/Anheuser-Busch contract which are in need of modification. Please consider this letter an official indication of our desire to arrange for a meeting sometime hopefully in October to discuss these changes.

Yours truly,

J R Bickle

James R. Bickle
Director of Merchandising
Corporate Affairs Division

JRB:DV

cc: Messrs. D. P. Long
Ralph Tolve
R. B. Bean

Keep America

A 526

PLAINTIFF'S EXHIBIT 24

INTER-OFFICE CORRESPONDENCE DATED DECEMBER 11, 1973
FROM JAMES R. BICKLE TO MR. DENNIS P. LONG

ANHEUSER-BUSCH, INC.

INTER-OFFICE CORRESPONDENCE

December 11, 1973

RECEIVED
DEC 11 1973
OFFICE OF
DENNIS P. LONG

Mr. Dennis P. Long JRB.

Plaintiff's Exhibit 24
8-23-1974 Donna A. Metz

Subject: Results of Tampa Meeting with Verne Clements on Wednesday, December 5

A major change which we wanted to incorporate into the new contract is a revision of the expiration date, which is currently set at December 26, 1974. We originally proposed that the expiration date for the Restaurant Associates operating contract be moved back to November 4, 1974 to coincide with the expiration of Restaurant Associates' contract with the union. RA then made a counter proposal that the expiration date be moved to January 15 and indicated that they would approach the union to modify their contract to expire on January 15 also. After the union was contacted, they subsequently declined to amend the termination date of their contract to coincide with the RA operating contract, so therefore we have a tentative agreement from RA to have the operating contract expire November 4, 1974 as originally planned.

Other points of discussion were:

1. A-B has tentatively agreed to reduce the percentage payment by RA in the Snack Stand operations from 40% to 35% effective January 1.

2. A-B has tentatively agreed to absorb all interior maintenance costs incurred for the Old Swiss House. The current arrangement is that RA pays for the first $30,000 of inside maintenance costs.

3. RA has requested some sort of indemnity clause in the contract which will provide protection for them in the event of an extended close-down of the Old Swiss House as happened in October of this year. The tentative agreement is that if the Old Swiss House is closed for a period of 3 days or less, there is to be no restitution to RA. However, if the Old Swiss House is closed for a period of more than 3 days and up to and including 10 days, then A-B will reimburse RA those fixed labor costs which RA has incurred in the Old Swiss House during that 7 day period which are not transferable in a productive capacity to other units in Busch Gardens. A-B will also agree to give at least 30 days prior notice to RA if A-B plans modifications to the Old Swiss House or to snack stand units in the Gardens which will require closing of these facilities.

RA has also requested that during the period of closedown of the Old Swiss House, excess sales generated in the Gardens due to the Old Swiss House closing would be entitled to a rental payment of 20% rather than the current 35%. This percentage would apply only to excess sales in the Gardens due to the closing of the Old Swiss House and only during the period the Swiss House is closed. no!

RA has also proposed that in the event of the closedown of a major snack stand in the Gardens for modifications (as is planned for the Safari snack stand in conjunction with the construction of the Entry Village early next Fall), the overall rent factor in the Gardens be reduced to 30% during the closedown period of this facility. Their contention is that there is a certain amount of fixed overhead in the major snack stands which cannot be transferred in a productive capacity to other snack stand facilities. no!

Other points of discussion were as follows:

1. Outstanding Invoices

RA has agreed to reimburse A-B in the amount of $2,740.64 as balance owed A-B for certain billings which occurred during 1973. Roger Bates is to send this invoice directly to Verne Clements. u

2. Construction and Equipment Items

A. RA would like A-B to cover the rental fee of 1 electric delivery cart. no!

B. RA requests A-B to purchase 2 ice machines to provide adequate ice for the snack stand operations. OK!

C. RA would like the installation of 2 folding partitions in the terrace seating area. They estimate the cost at $600 to $800 and want these partitions so that they may offer the terrace for banquet and special party use at night. OK.... H.G. to compromise

3. Operational Items

A. RA would like to relocate the small kiosk, currently on the patio of the Safari snack stand, to the sheltered area west of the Hospitality House formerly used for pretzel and drink sales. They want to operate this as a temporary pretzel and drink facility while the new Hospitality House pretzel and pizza stand is in construction. I don't know what Rainwood Inc. Where the Safari is?

B. RA would like to sub-contract the use of the bakery kitchen in the Old Swiss House at night to a local wholesale bakery operation who needs additional facilities. RA would then pay A-B a percent of the sales or a straight rental fee as mutually agreed upon.

No!

A 528

Plaintiff's Exhibit 24

C. RA wishes to gain authorization for their management employees and for delivery men to have access through gates other than the 40th Street gate (please note enclosed letter from Ernie Fonseca).

Only if Labor Lawyers & Strikers agree

James R. Bickle

JRB:DV

Enclosure

cc: Messrs. R. A. Bates
R. B. Bean
J. W. Gillespie

A 529

Plaintiff's Exhibit 24

November 20, 1973

Mr. Robert Bean
General Manager, Busch Gardens
3000 W. Busch Blvd.
Tampa, Florida

Dear Mr. Bean:

It has come to my attention that due to the labor dispute between Restaurant Associates and Local 104, Anheasuer-Busch has issued an order that no entrance except the 40th Street Entrance shall be used by any Restaurant Associate employee.

This is to inform you that any person in a managerial position is recognized by the union to have the right to enter and exit at any entrance or exit on Anheasuer-Busch property without Union interference.

Realizing that management has to inspect all food operations periodically, we recognize their right to enter and exit at locations convenient to their operations. This is applicable to all future entrances and exits as well as to those presently in use.

We also acknowledge that Restaurant Associates shall have the privilege to receive deliveries at the 30th Street Entrance.

We feel certain that should any disputes occur, they will be settled without having to resort to measures similar to those employed in the past.

Please feel free to forward copies of this letter to your legal department or to the Brewery in the event that you deem it necessary.

Thank you.

Sincerely,

Ernie Fonseca
President, Local 104
Hotel, Motel, Restaurant Employees and Bartenders Union

EF:tf

A 530

PLAINTIFF'S EXHIBIT 25

INTER-OFFICE CORRESPONDENCE DATED DECEMBER 17, 1973
FROM JAMES R. BICKLE TO MR. DENNIS P. LONG

ANHEUSER-BUSCH, INC.

INTER-OFFICE CORRESPONDENCE

December 17, 1973

Copy to R. Schwartz

Tampa RA - Old Swiss

Mr. Dennis P. Long

Pltf's Exh. 25 For Ident.
2-23-79 Donna A. Mats

Subject: Restaurant Associates' Contract and Suggested Changes In Phraseology from Paul Saad

Please note the attached letter from T. Paine Kelly in regard to the proposed changes in phraseology suggested by Paul Saad. Mr. Kelly states that the suggested changes may cause complications with our other license agreement under the special agreement with the Florida Alcoholic Beverage Commission. The changes proposed by Saad are, of course, intended to help soften the "principal-agent" relationship which very obviously exists to a very strong degree in this contract. However, As Rich Schwartz mentioned, obviously, in the event that this issue goes to the NLRB as to whether Anheuser-Busch can be ruled as a joint employer, the union attorney will subpoena all past contractual agreements between Anheuser-Busch and Restaurant Associates for use as evidence, and therefore the change in the current contract will serve no real purpose.

In light of this and the fact that these changes could conceivably cause repercussions with the Florida ABC, I feel it might be wise to let the contract stand as is with just the negotiated changes that have been agreed upon by Verne Clements and myself with your concurrence.

Under the new contract, we will have to serve notice to Restaurant Associates of an intention not to renew the contract for 1975 no later than August 4 of this coming year. It appears that Marriott has had second thoughts about the takeover of the Old Swiss House and Snack Stand operations due to the "joint employer problem." If Marriott feels that there is a significant chance Anheuser-Busch might be ruled the primary employer due to the contractual relationship with RA and thus forced to bargain with the union as the primary employer, then it appears that Marriott would consider the risk greater than the possible reward.

James R. Bickle

JRB:DV

Attachments

BEST COPY AVAILABLE

RECEIVED
JAN - 3 1974
ANHEUSER-BUSCH, INC.
LEGAL DEPT.

A 531

PLAINTIFF'S EXHIBIT 27

INTER-OFFICE CORRESPONDENCE DATED JANUARY 29, 1974
FROM DENNIS P. LONG TO MR. AUGUST A. BUSCH, III

ANHEUSER-BUSCH, INC.

INTER-OFFICE CORRESPONDENCE

Mo. Gen's Ex. 27 ..... For Ident 2-23-76 Donna A. Metz

January 29, 1974

CONFIDENTIAL

Mr. August A. Busch III

Transition...Tampa Food and Beverage Program

As you know, we have extended our contract with Restaurant Associates...for the Old Swiss House and in-park food services at Tampa...through November 4, 1974. However, we still feel that the service and quality of food at Tampa is not up to our standards, and it is our intention to notify Restaurant Associates on August 5, 1974 that we have a new contractor for the Swiss House...and that we will run the in-park food operations with Busch Gardens personnel.

The purpose of this memo is to outline the assumptions and strategies that will enable us to do so, and to get your inputs and direction...so we can proceed in an immediate and orderly fashion.

I. Tampa Hotel Project

Since a hotel at Tampa has a major impact on our plans and strategies, it is necessary that we assume a "Go" decision on the Tampa Hotel is delayed at least two years.

Preliminary data from Corporate Planning indicates a 10% to 12% DCFROI for the Tampa Hotel...but we were waiting for final inputs from Marriott before we pursued the project. Now it seems that the project should be deferred...for the following reasons:

A. The unknown effect of the Energy Crisis on Tampa's attendance.

B. The conservative attitude, among top management, toward capital spending.

II. Old Swiss House

The fact that the Hotel decision is delayed changes our plans to have Marriott operate the Old Swiss House...and forces us to search for a new contractor. While we would like to retain flexibility... it is likely that the new operator will have union employees... which will broaden the number of available contractors and lessen the impact of our in-park transition from union to non-union.

We also need your guidance on another Old Swiss House matter... we would like to change the Swiss House menu away from a gourmet operation to a high-quality, more limited menu...similar to the food served in the Tenderloin Room. We suggest such because:

A. The "Gourmet" menu...style and prices...is not consistent with a theme park setting or clientele.

B. In our review of the Old Swiss House operations, various restauranteurs (Restaurant Associates, Marriott) have advised that the kitchen facilities are inadequate for such an extensive menu...and that the facilities should be expanded. While kitchen modifications will probably be needed under any circumstance, they will be less extensive if we revert to a less complicated menu.

C. The labor and benefit costs are considerably higher for a gourmet restaurant...43% versus 30% for a more limited menu...which contributed to a $182,000 loss for us in 1973.

These cost and operational problems indicate a reduced menu... which, if approved, would be an input to our search for a new operator.

III. <u>In-Park Food Operations</u>

As we did in Los Angeles, we propose to remove R.A. as in-park food contractor on November 5th...and assume this function ourself. We suggest such because:

- We have not found anyone who can meet our high standards of service and food quality.

- Our system is more efficient and profitable...for example, since we removed R.A. in Los Angeles, the food and beverage per capita has increased 37¢ climbing from 23¢ to 60¢. We feel we can effect a similar increase in Tampa.

Paul Saad has advised that we can, at Tampa, effect a transfer from a union operation to an in-house non-union operation by effecting a plan similar to that used at the L.A. Gardens... where we removed R.A. and the union. This plan is:

A. To allow the R.A. contract with the union to expire.

B. To construct all our in-park food positions (70 employees... including 6 union positions) so that they are less than permanent.

C. Notify the union that all in-park food positions, including the 6 union jobs are being changed to part-time jobs.

A 533

Plaintiff's Exhibit 27

It is Paul's opinion that if the union is retained in the Old Swiss House...and if we follow A, B and C above...we should be able to effect the transition with little if any trouble.

However, it should be noted that the above plan could present some problems. For example:

- The present Old Swiss House operation is very inefficient, and a new operator will be forced to review R.A.'s current manpower usage...and probably effect a reduction in the work force. This reduction will be greater if we move to a non-gourmet menu.

- The union could object to our non-union stance in-park... and while we feel they have no legal recourse, there is always the possibility of some kind of disturbance.

Despite these risks, we feel our program to be best for our long range growth... and feel that we should implement the program shown.

Please advise.

Dlong

Dennis P. Long

DPL:kw

cc: Messrs. C. T. Jarrell
J. R. Bickle

A 534

PLAINTIFF'S EXHIBIT 28

INTER-OFFICE CORRESPONDENCE DATED SEPTEMBER 26, 1974
FROM DENNIS P. LONG TO MR. JAMES R. BICKLE

ANHEUSER-BUSCH, INC.

INTER-OFFICE CORRESPONDENCE

September 26, 1974

CONFIDENTIAL

Plf's Exhibit Ex. 28 For Ident
2-23-1976 Donna A. Metz

Mr. James R. Bickle

Old Swiss House Contract with
Restaurant Associates Industries, Inc.

I have reviewed the subject matter and have the following questions and/or comments:

I. Profit and Loss

I have never understood...and still don't...how much this operation costs us. Accordingly I have the following questions:

A. Do we receive a monthly or yearly P&L?

B. Who audits their records..and could we employ A-B auditors to be sure we are not being "taken"? I would think we should have a quarterly review...in detail.

C. Where do we show the net result of our OSH operation? Roger Bates - please advise. If we do not do so now, please arrange for us to do so in 1975.

D. Page 7, item V says that "...Associates shall retain the the Net Profit for each Term Year. In the event that the management of the Restaurant...shall result in a Net Deficit...Busch will reimburse Associates the amount of the Net Deficit...". Does this mean that we cannot make a profit...that on top of a breakeven situation (at best) we must still pay various expenses...and that they cannot lose? If so - it's ridiculous!

E. I recall we had some difficulties getting payment from them on some maintenance items and utility expenses. Does this correct that problem...does it clearly spell out who is to pay and when...what was the problem and how does this new arrangement affect our cost? Roger Bates - please advise.

F. I would like the estimated net cost to A-B of the OSH in 1975.

II. Please advise the net changes of this agreement from the previous one.

A 535

Plaintiff's Exhibit 28

III. Page 9...VII. Term...is this the same term as their union contract? And, if so, is that what we want?

IV. Page 10...X. C...does this mean that if we are closed by a strike, we must pay them their fixed cost for ten days? And/or...if we are closed by a strike - and their employees honor the picket line, are we forced to pay?

V. Does this contract protect us if we decide to build a hotel? I don't recall the specific problems we faced with the old contract... but let's try to write them out of this one.

VI. With this letter, I am sending copies of the contract to H. Greenblatt, Roger Bates, C. Jarrell, Joe Fincher, F. Logan and Paul Saad asking for their comments and/or suggested changes.

VII. Finally...tell R.A. we want a signed contract - ON TIME.

Dennis P. Long

DPL:kw

cc: Messrs. W. H. Thurman
J. W. Gillespie
H. M. Greenblatt - w/attach.
R. A. Bates - w/attach.
C. T. Jarrell - w/attach.
J. C. Fincher - w/attach.
F. Logan - w/attach.
P. Saad - w/attach.
R. A. Schwartz - w/attach.

A 536

PLAINTIFF'S EXHIBIT 29

INTER-OFFICE CORRESPONDENCE DATED OCTOBER 30, 1974
FROM DENNIS P. LONG TO MR. JAMES R. BICKLE

ANHEUSER-BUSCH, INC.

RECEIVED
NOV 5 1974
GEN. MGR.

INTER-OFFICE CORRESPONDENCE

October 30, 1974

CONFIDENTIAL

Pltf's Dem's Ex. 29 For Ident
2-23-19-76 Donna A. Metz

Mr. James R. Bickle

Old Swiss House Contract with
Restaurant Associates Industries, Inc.

On September 26, 1974 I wrote you a letter on the subject matter. This letter will record the answers received, ask additional questions, and give additional direction.

I. Profit and Loss

Roger Bates advises that at the 2-1/2% of gross sales up to $1.2 MM...and 5% of anything greater, we recorded a loss of $182,237 in 1973 and $137,100 in 1974 (estimate). He also shows that R.A. made a net profit of $38,415 in 1973...and $52,490 in 1974 (estimate).

I have the following comments:

A. It is difficult to accept a loss on an operation that will gross almost $1.4 MM. Jim Bickle...I would like your suggestions as to how we can eliminate this loss.

B. Roger Bates...I want a monthly P&L for the O.S.H. spelling out their profit and our loss. Needless to say. the 1975 budget should also show the O.S.H. as a separate item.

C. While everyone states that we "can" audit their operation, no one knows if we have. Mike Carpenter's memo states that we require the P&L to be certified by a C.P.A. Is each P&L we receive certified? If so - by whom? Roger Bates... I would like a detailed control and review program from you and/or St. Louis auditing...spelling out how we can prevent an understatement of revenue and/or an overstatement of costs.

A 537

Plaintiff's Exhibit 29

D. Mike Carpenter has stated that the new contract language relative to maintenance payments is clear. In the review called for in "C" above, establish some responsibility as to who follows up on such unpaid bills from R.A. If it drags on too long - involve me. Note...that Jim Bickle's memo states that all utility bills for the O.S.H. should be billed directly to them... and not through us. I agree - have it changed.

II. Signed Contract

As I understand it...the contract with R.A. expires this week. Has Tolve returned our contract?

Dennis P. Long

DPL:kw

cc: Messrs. W. H. Thurman
J. W. Gillespie
R. A. Bates
C. T. Jarrell
J. C. Fincher
F. Logan
P. Saad
M. Carpenter

A 538

PLAINTIFF'S EXHIBIT 31

INTER-OFFICE CORRESPONDENCE DATED JANUARY 27, 1975 FROM JAMES R. BICKLE TO MR. DENNIS P. LONG AND MR. WILLIAM H. THURMAN

ANHEUSER-BUSCH, INC.

RECEIVED
JAN 28 1975
OFFICE OF DENNIS P. LONG

INTER-OFFICE CORRESPONDENCE

January 27, 1975

1/29/75

Wm. Exhibit No. 31 For Identification 2-23-1976 Donna A. Matz

CONFIDENTIAL

Wm B. OK TO PURSUE WITH SID... FINAL PROPOSAL TO BUSCH SHOULD COMPARE ELEMENTS OF R.K. CONTRACT TO SHERMAN'S SID'S FINANCIAL STATUS.

Mr. Dennis P. Long
Mr. William H. Thurman

Status Report Of Pending Transfer Of The Old Swiss House Management.

Several preliminary items had to be taken care of before we could seriously pursue the idea of transferring Old Swiss House management in the immediate future. One very important consideration was to obtain an opinion from the Legal Department as to just what, exactly, our legal position is with regard to the operating contract.

cc: Bill T.

Mike Carpenter informed me that in his opinion we are in a good position to terminate the contract at any point since, as he sees it, there is no enforceable agreement in existence at the present.

Other very important points to be covered were:

1. What type of agreement would Sid Sherman agree to?

2. What, if any, preconditions would Sid have prior to signing the agreement?

3. Does he have the financial wherewithal to set up an independent company and cover the start-up costs which would be involved?

In regard to the type of agreement (#1), Sid wants very much to have some sort of a profit sharing type of agreement which would enable him to make at least as much as his current salary amounts to with the potential of further improving remuneration as the performance of the Old Swiss House improves. My recommendation as to the type of agreement is that we offer Sid a basic salary of say, $20,000.00 a year plus a percentage of gross sales/net profits. The percentage should probably escalate beyond a given point so as to provide the strongest motivation for Sid to take the Old Swiss House to an operational break even point.

In regard to preconditions of an agreement (#2), Sid feels very strongly that a great deal of nighttime business at the Old Swiss House is being lost due to the lack of a prominent and well lighted sign on Busch Boulevard announcing that the Old Swiss House is open until 11:00 P.M. Sid has in effect made the installation of a sign of this type a precondition to his taking over the operation, since he feels that the developing of the nighttime business is the only way he can offset the decline in lunch business he expects as we increase food service facilities in the Gardens. I personally feel this is a reasonable request and should be complied with.

A 539

PLAINTIFF'S EXHIBIT 31A

INTER-OFFICE CORRESPONDENCE DATED JANUARY 28, 1975 FROM JAMES R. BICKLE TO MR. DENNIS P. LONG AND MR. WILLIAM H. THURMAN

I do not have a clear idea at this point of Sid's financial status (Ø3) even though he assures me that it would be no problem for him to absorb the start-up costs involved in a take over (so long as this occurs during a high cash flow period). My feeling is that Don Collins, Mike Carpenter and myself should go to Tampa in the near future to meet with Sid and discuss all related elements involved in the establishment of his new company, arrangements for the setting up of payroll and accounting functions, etc. so that all involved have a clear idea of the timing and elements of the overall "game plan."

Sid is very nervous about any inadvertent leaking of our proposed intentions and I feel we should reassure him in every way possible that no one with Anheuser-Busch will be made aware of the upcoming events unless it is absolutely necessary that they be informed. As you are aware rumors were very commonplace prior to the Anheuser-Busch take over of the snack stands, and we could not afford to have that situation exist in the case of the Old Swiss House.

Judging from the eleven months' operating statement (see attached) which shows net operating profit for the Old Swiss House through November, 1974 of $128,000, the Old Swiss House should show a net operating profit to Restaurant Associates for 1974 of about $140,000. This excludes $36,600 occupancy cost payments made to Anheuser-Busch. Therefore, theoretically if Sid Sherman had been working for Anheuser-Busch in 1974, rather than Restaurant Associates, then we could have shown a net operating profit for the Old Swiss House at $165,000 which is almost enough to cover the DTI load. In reality, the operating profit would not have been this high as Restaurant Associates has been providing functions such as payroll, accounts payable, etc. for which the Old Swiss House is not charged. In any event, however, I feel that we can make a very significant improvement in the cash flow provision of the Old Swiss House with the move we are proposing and that a change of this sort is the only conceivable way that the Old Swiss House may approach a break even situation.

James R. Bickle

JRB:sjf

Attachments

Pltf's Ex. #31A - ALL - 2/24/76.

A 540

PLAINTIFF'S EXHIBIT 33A

INTER-OFFICE CORRESPONDENCE DATED APRIL 23, 1975 FROM JAMES R. BICKLE TO MR. DENNY LONG AND MR. WILLIAM H. THURMAN

ANHEUSER-BUSCH, INC.

INTER-OFFICE CORRESPONDENCE

April 23, 1975

R.A. - meeting
- agency fee
- legal opinion
- memo to file

Mr. Denny Long
Mr. William Thurman

SUBJECT: Proposed Old Swiss House Change

I. Situation Analysis

The change in the Old Swiss House management from Andy Anderson to Sid Sherman in early 1974 brought to light some very interesting changes in the financial performance of the restaurant. For the year 1973 under Anderson's management, the Old Swiss House generated an operating profit of $38,415. In 1974, under Sid Sherman's direction, an operating profit of $145,000 was achieved despite a decrease in garden's attendance of over 240,000. Sid Sherman also has generated a very good rapport with the Busch Gardens' management and has been most cooperative and aggressive in instituting proposed changes and improvements in the operation.

II. Alternatives

In light of the fact that the Old Swiss House has consistently been generating a very low return for Busch Gardens, we began in early 1974 to consider alternatives to improve the financial performance of the operation. This included meetings with other prospective restaurateurs (example: Marriott, Saga, Lawry's, etc.). The idea being that we might find a reputable operator who would maintain the standards of quality and service required in the Old Swiss House, while improving the profit picture for Busch Gardens. We have also considered the possibility of operating the Old Swiss House as a part of the Busch Gardens Division as a possible alternative. An in-house operation of the Old Swiss House is deemed primarily unfeasible because:

a) Anheuser-Busch employee salaries and benefits are much higher than those currently being earned by the Old Swiss House employees, and would therefore greatly increase operating expense.

b) The Old Swiss House is a union operation being controlled by the Local Restaurant Workers and Bartenders Union, and our taking over of the Old Swiss House would place us in the position of operating union and non-union food service (the snack bars) side-by-side, which would most certainly be an unstable situation.

Kuhn's Ex #537-mih- 3/24/76

A 541

Plaintiff's Exhibit 33A

After reviewing the proposals of various restaurateurs and examining the possibilities of in-house operation, the consensus of opinion by myself, Joe Fincher, Don Collins, and Burl Purvis was that we should offer the operation of the Old Swiss House to Sid Sherman as an independent contractor for a fixed management fee amount, plus a net profit bonus percentage under an agreement, whereby Busch Gardens shall retain all net operating profits. Sid has agreed to do this and has made all necessary preliminary arrangements.

The current situation with Restaurant Associates is that there does not exist currently a signed contract for 1975. In late 1974, after the Busch Gardens takeover of fast food, a contract was offered to Restaurant Associates covering the period to November 4, 1975, and consisting of basically the same elements as in prior contracts. Restaurant Associates declined to sign the offered contract and instead wrote their own contract, which they returned to us for signature. This contract containing substantive changes. This happened in December, 1974.

Beyond that date, no further progress has been made in the signing of an operating contract for 1975, and in discussing our legal position with Mike Carpenter of the Legal Department, his opinion is that our best procedure would be to inform Restaurant Associates, via a 30-day written notice, that since they declined to sign our offered contract, we wish to terminate the existing agreement as of May 31, 1975. This notice to take place the first day of May. Concurrently at this point, Sid Sherman will notify Restaurant Associates that he has agreed to become the new Old Swiss House restaurateur, and that he will be leaving the employ of Restaurant Associates at the end of thirty days, or at whatever time they desire. Sid would then also immediately contact the local union representative, explain the situation, and guarantee to accept the existing union contract under the same terms and conditions. Starting then June 1st, Sid Sherman, Incorporated would take over the payroll and benefits package for Swiss House employees, so that there is no interruption in the operation or its payroll or accounts payable systems.

At this point, I feel that possible repercussions should be noted:

1. In a meeting held in the Old Swiss House in April, 1974, at which myself, Bill Thurman, and Joe Fincher were in attendance, we asked whether Restaurant Associates would be agreeable to increasing the percentage of gross sales rental payments in the new contract from 2½% to 5%.

   Ralph Tolve replied that they would not consider increasing the rental payments, and that furthermore, if Anheuser-Busch and Restaurant Associates were not able to renew the agreement under the same terms and conditions, that he would instruct all Restaurant Associates' operators to drop Anheuser-Busch products from their restaurants.

A 542

Plaintiff's Exhibit 33A

2. There is a slight possibility that Restaurant Associates may upon receiving the notice of cancellation, decide to instigate some court action against either Busch or Sid Sherman, in effect charging that Busch has conspired with Sherman in an effort to induce him to break his employment contract with Restaurant Associates (the employment contract is implied and not written. Sherman has never had a written employment contract with Restaurant Associates).

   In the event they did this and were successful, they might be expected to win damages equal to their anticipated profits from the Old Swiss House under Sherman's management for the balance of the 1974 term, which ends November 4, 1975.

3. Restaurant Associates does own a certain amount of office furniture and equipment, kitchen equipment, and supplies, etc., for which they would expect to be reimbursed by Busch.

   Our position on this would be that we reimburse Restaurant Associates only for those items for which they can supply documentary proof that the items were purchased by Restaurant Associates, Incorporated, and not from Swiss House revenues.

   It is estimated that the total value of equipment, supplies, and inventory could be in the area of $30,000.

Financial Projections:

Attached is an actual 1974 Old Swiss House Profit and Loss, showing Busch Gardens revenues under the current Restaurant Associates contract, but with a new column adjacent showing the Busch Gardens revenues that would have been received had the Old Swiss House operated in 1974 under the terms and conditions of the new Sid Sherman contract.

If this contract had been in force in 1974, Busch Gardens revenues would have been $133,000 as opposed to $48,000, which was the actual.

The prognosis for 1975 is that there will be a significant increase over the profits of 1974, if our attendance holds, and as Sid Sherman continues to make improvements in the operation.

James R. Bickle

JRB:bk

enclosure

A 543

Plaintiff's Exhibit 33A

OLD SWISS HOUSE OPERATION

(1974 Figures - Approximate)

(000's)

	PRESENT ARRANGEMENT	PROPOSED ARRANGEMENT
Sales	$1,570	$1,570
Cost Of Sales	502	502
Gross Profit	$ 968	$ 968
OPERATING EXPENSES:		
Sid Sherman's Salary	$ 32	$ 40
Occupancy Cost (Rent paid A-B)	48	-
Other Costs	743	743
Bookkeeper	-	20
Attorney's Fees	-	2
Accounting Charges	-	10
CPA Fees	-	3
Medical Benefits	-	10
Miscellaneous	-	5
TOTAL	$ 823	$ 833
OPERATING PROFIT	$ 145	$ 135
Busch Garden's Portion	48	133
Operator's Portion	145	2
Maintenance Expense	78	78
Busch Gardens Cash Flow	(30)	55
Depreciation, Taxes and Insurance	122	122
BUSCH GARDENS NET PROFIT	(152)	(67)

A 544

PLAINTIFF'S EXHIBIT 34

INTER-OFFICE CORRESPONDENCE DATED APRIL 25, 1975 FROM DENNIS P. LONG TO MR. AUGUST A. BUSCH, III

ANHEUSER-BUSCH, INC.

INTER-OFFICE CORRESPONDENCE

Mfg Exhs Ex. 34 for ident.
2-23.19.76. Donna A. Metz

April 25, 1975

Mr. August A. Busch III

The attached proposal for the Old Swiss House is self-explanatory. I recommend the change from Restaurant Associates to Sid Sherman based on:

+100,000
.74 BASIS

1. An increase in dollar return to Anheuser-Busch.

2. The fact that Sid Sherman efficiently operates the Old Swiss House at this point in time, with little if any assistance from Restaurant Associates so that any monies we now pay them is for naught.

3. Since Sid Sherman has become Manager of the Old Swiss House the previous inefficient, unsanitary, and impersonal approach has been eliminated.

By copy of this memo I am asking Orion Burkhardt if he has any major concern over the last paragraph on page two.

Also by copy of this letter I am advising Sandy McDonald of the statement made by Ralph Tolve in that same paragraph.

Dlong

Dennis P Long

CC: Messrs. O. P. Burkhardt
D. S. McDonald
J. R. Bickle
W. H. Thurman

A 345

PLAINTIFF'S EXHIBIT 35

LETTER DATED MAY 13, 1975 FROM SIDNEY SHERMAN TO JAMES R. BICKLE ENCLOSING COPY OF PROPOSED DRAFT AGREEMENT BETWEEN ANHEUSER-BUSCH INCORPORATED AND SHERMAN MANAGEMENT CORPORATION

Pltf's Ex. 35 For Ident
3-12-1976. Donna A. Metz

Tulsa - May 13, 1975 -

Dear Jim,

Everything spelled out in this agreement is fine with me. As far as I am concerned, we have a deal.

However, I have only one concern, and that is, that we sign, date and finalize this agreement the same or following day that I notify "RA" as to what is happening.

Rest assured of a continued and even more successful future ahead -

Sincerely -

Sid

A 546

Plaintiff's Exhibit 35

THIS AGREEMENT dated _____, 1975, but commencing as hereinafter set out, is between ANHEUSER-BUSCH, INCORPORATED, a Missouri corporation, with principal offices at 721 Pestalozzi Street, St. Louis, Missouri ("Principal"), and ~~SIDNEY SHERMAN, an individual doing business as~~ SHERMAN MANAGEMENT CORPORATION, with principal offices at 204 TAMPA WOODS DR. TEMPLE TERRACE FLORIDA 33617 ("Agent").

PREAMBLE

Principal is the owner of certain premises in Tampa, Florida known as Busch Gardens, upon which premises is located a restaurant known as The Old Swiss House, ("The Restaurant"). Agent is engaged in the business of managing restaurant and food and beverage operations and of offering consultation services with respect thereto. Principal is desirous of employing Agent to act as its agent in managing the food and beverage operations at The Restaurant, and Agent is desirous of providing such service.

NOW, THEREFORE, it is agreed that:

I. DEFINITIONS

When used throughout this Agreement, the following terms shall have the meanings indicated:

(a) "Equipment" shall mean all fixtures, machinery, tools, equipment and articles of personal property owned and furnished by Principal and used solely in connection with the operation of the food and beverage service conducted at The Restaurant, and all replacements therefor.

(b) "Net Profit" shall mean the amount by which Gross Receipts exceed Operating Expenses.

(c) "Gross Receipt" shall mean all revenues and income of any kind derived directly or indirectly and actually received from catering services or the food and beverage service both at The Restaurant or elsewhere, including without limitation, from the sale, whether on a cash or credit basis, beverages and tobacco, excluding, however, federal, state and municipal excise and sales taxes and excluding gratuities to employees paid by customers in connection with purchases made by them.

(d) "Operating Expenses" shall mean the aggregate of all expenses paid or incurred in connection directly and exclusively with the business conducted at The Restaurant in accordance with the accrual method of standard accounting procedures. Without limiting the generality of the foregoing, Operating Expenses shall include the cost of:

(i) Wages, salaries, payroll taxes, Social Security taxes, fringe benefits and other usual and customary incidental employee benefits paid to and for employees who are employed directly and exclusively in connection with the business conducted at The Restaurant.

(ii) Cost of food, beverages and tobacco sold in, on or from The Restaurant.

(iii) Maintenance costs, the payment for which Agent is obligated under the provisions of paragraph VI. (d) hereof.

(iv) Miscellaneous expenses incurred in providing the business conducted at The Restaurant with such items as china, glassware, silverware, utensils, cleaning supplies, paper supplies, sales promotion, public relations and advertising, office supplies, armored car service, credit card service, bad debts expense, dues, subscriptions, laundry and similar items routinely incurred in the day-to-day affairs of The Restaurant.

II. PURPOSE AND SCOPE OF AGREEMENT

(a) Principal engages Agent to serve as its agent in the management and operation of the food and beverage services at The Restaurant under the terms and conditions hereinafter contained. Agent, subject to the terms and conditions hereinafter contained, agrees to serve as Principal's agent to that extent. This Agreement is intended to create a principal/agent relationship between the parties and is not intended to create a partnership or a joint venture, or to employ Agent as an independent contractor.

(b) Agent shall manage The Restaurant as the agent for and under the direction of Principal and imposed by law. At all times during Agent's performance hereunder, Principal shall have the right to oversee, control and direct any and all operations of The Restaurant. The choice of menu items and prices for the items sold shall be subject to the approval of Busch.

Without limiting the generality of the foregoing, the choice of menu items and prices for such items sold in The Restaurant shall be subject to the prior approval of Principal. All advertising and promotional activities shall likewise be subject to the prior approval of Principal. Principal has the right to inspect and examine Agent's operation of the service and to require reasonable corrective measures for what principal deems to be substandard performance. All repairs and maintenance shall be performed at the direction of Principal.

III. UNDERTAKINGS OF AGENT

(a) Agent shall during the term of this Agreement, in the discharge of its duties hereunder, among other things:

(i) Manage food and beverage service at The Restaurant to the best of its ability in accordance with the terms and conditions herein and

in accordance with all applicable governmental laws and regulations. In this regard, Agent shall, among other things and without limiting the generality of the foregoing:

(1) Collect all Gross Receipts and promptly pay or cause to be paid on behalf of Principal all Operating Expenses incurred in connection with the operation of The Restaurant.

(2) On behalf of Principal, negotiate and enter into contracts required for the operation of The Restaurant during the term of this Agreement. No contract shall have a term which exceeds the initial term of this Agreement unless Principal gives prior written approval for any such longer term.

(3) Maintain in accordance with recognized accounting procedures, for so long as this Agreement is in force and for one year thereafter, separate records and books of account, recording all transactions at or in any way connected with the operation of The Restaurant including invoices and purchase orders, which books and records shall, during ordinary business hours, be open to examination for the purposes of an audit of Gross Receipts and Operating Expenses, by Principal or its representatives. Agent agrees to cooperate in any such examination or inspection.

(4) Use its best efforts to make a profit.

(5) Correlate the operations of The Restaurant with any special events, promotions or programs conducted by Principal at Busch Gardens.

(6) Employ on a full-time basis, three (3) maintenance men to do minor maintenance necessary to the routine operation of The Restaurant and to perform routine cleaning tasks.

(7) On each following operating day, Agent will furnish to Principal a report of the Gross Receipts from the previous day.

Within three (3) weeks following the end of each month, and within three (3) weeks following the termination or expiration of this Agreement, Agent shall render to Principal a statement covering all operations performed hereunder. Such statements will include (i) a total of the Gross Receipts both for the previous month and for the cumulative period to date from the beginning of the Term Year, (ii) a total of the operating expenses both for the previous month and for the cumulative period to date from the beginning of the Term Year, and (iii) a profit and loss statement for The Restaurant both for the previous month and for the cumulative period to date from the beginning of the Term Year.

The final profit and loss statement for each term year shall be certified accurate by a Certified Public Accountant and all profit and loss statements shall be subject to audit by Principal, which audit must be performed within ~~a reasonable~~ SIXTY DAYS time after the statement is issued.

(b) Agent shall prepare a weekly list of repair and maintenance items and shall submit requests for work to be performed to the General Manager of Busch Gardens, Tampa. However, in emergency situations, Agent may proceed as circumstances warrant.

(c) Agent will provide the maintenance work for which it is made responsible by the provisions of paragraph VI. (d).

(d) All property and Equipment provided by Principal hereunder shall remain the property of Principal and Agent shall not sell, lease, pledge or otherwise encumber the Equipment.

IV. UNDERTAKINGS OF PRINCIPAL

(a) Principal agrees to make available to Agent, free of charge, the use of The Restaurant and the use of the Equipment therein during the term of this Agreement, and Principal agrees that Agent shall peaceably and quietly enjoy the use of The Restaurant and the use of the Equipment therein subject to the provisions of this Agreement for so long as Agent performs its obligations hereunder.

(b) Principal shall make all repairs and replacements and perform all maintenance for which Principal is obligated by the provisions of paragraph VI. (c) hereof.

(c) Principal shall maintain, repair and replace the flags in front of the Restaurant. Such costs shall not be included in Operating Expenses.

V. AGENT'S COMMISSION

For the services rendered hereunder, Agent shall receive Forty Thousand ($40,000) Dollars, payable in equal monthly installments for each Term Year. In the event that the management of The Restaurant for any Term Year shall result in a Net Operating Profit in excess of $50,000.00 for that Term Year, Principal shall pay Agent an additional sum equal to three percent (3%) of the net operating profit in excess of $50,000.00 in any term year. In the event that the Net Operating Profit in any Term Year shall exceed Two Hundred Thousand Dollars ($200,000.00), Principal shall pay Agent an additional sum equal to five per cent (5%) of the Net Operating Profit in excess of $200,000.00. Payment of this sum shall be made within ninety (90) Sixty (60) days of completion of the audit of The Restaurant profit and loss statement by Principal as set forth in paragraph III. (a) (i) (7) above.

VI. MAINTENANCE

(a) Pursuant to the provisions of paragraph III. (b), Agent shall notify Principal of any and all necessary maintenance, repair or replacement work. The General Manager of Busch Gardens, Tampa, will then determine whether the work is to be performed and, if so, the proper party to perform. All maintenance, repair or replacement work will be done by either (i) maintenance men retained by Agent pursuant to the terms of paragraph III. (a) (i) (6) hereof, (ii) independent contractor(s), or (iii) Principal's personnel.

(b) The cost of all major maintenance, replacement and repair items is to be borne by Principal and is not to be included in Operating Expenses. It is the general intent of the parties that Principal will bear the expense of major maintenance work, including repair and replacement of capital equipment, and that minor or routine maintenance and cleaning costs will be charged to Operating Expenses.

(c) Without limiting the generality of the foregoing, those items to be borne directly by Principal include:

(i) The cost of maintaining the exterior of The Restaurant.

(ii) All direct and indirect labor charges or expenses related to maintenance, repair or replacement work performed in or on The Restaurant or Equipment by Principal's personnel.

(iii) The cost of all materials, supplies, parts and the like required for the repair, replacement or maintenance of Equipment and/or facilities within, or a part of, The Restaurant.

(iv) All labor and material costs incurred in connection with the utilization of outside contractors to perform repair and/or maintenance work in The Restaurant.

(d) Without limiting the generality of the foregoing, items which are to be charged as Operating Expenses include:

(i) All costs of labor, materials, supplies, and the like incurred for the cleaning of The Restaurant.

(ii) All direct and indirect labor charges or expenses related to the three (3) maintenance men employed by Agent pursuant to the provisions of paragraph III. (a) (i) (6) to repair and maintain the Equipment and/or facilities within, or a part of, The Restaurant.

(iii) The cost of all laundry and linen service and trash removal.

(iv) The cost of all utilities provided to The Restaurant.

VII. TERM

(a) The initial term of Agent's appointment to manage The Restaurant shall commence on June 22, 15 1975, and terminate November 4, 1977. For purposes of this Agreement, "Term Year" shall mean the period beginning on June 22 15 through and including the following June 21. 14.

(b) This Agreement shall be automatically renewed for an additional term of one (1) year, upon the same terms and conditions contained herein (with the exception of this automatic renewal provision), or as later amended, without further written instrument between the parties, unless either party shall give written notice to the other not less than ninety (90) days prior to the expiration of the initial term that the Agreement shall terminate at the end of the initail INITIAL term.

VIII. UTILITIES

Principal shall have the right to temporarily discontinue the supply

of all or any of the utilities services when reasonably necessary in making repairs, alterations, changes or improvements in The Restaurant or elsewhere.

IX. GOVERNMENTAL REQUIREMENTS

Agent shall observe and promptly execute the provisions of any and all present and future governmental laws, rules, regulations and other demands pertaining to its activities or occupancy hereunder.

X. TERMINATION

(a) Principal may at any time during the term of this Agreement, upon ten (10) days' written notice to Agent, terminate this Agreement upon the occurrence of any one or more of the following events:

(i) Agent shall become insolvent, take the benefit of any present or future insolvency statute, make a general assignment for the benefit of creditors, file a petition in bankruptcy or a petition or answer seeking an arrangement, reorganization or the readjustment of its indebtedness under the federal bankruptcy laws or any other similar federal or state law, be adjudged a bankrupt or consent to the appointment of a receiver, trustee, or liquidator of all or substantially all of its property; or

(ii) Agent shall be in default in the performance of any of the terms, covenants or conditions hereof to be performed, kept or observed by Agent, which such default Agent shall not have cured within ten (10) days after receipt of written notice thereof, or in the event such default is not capable of being cured within such ten-day period, which said default Agent shall not have commenced steps to cure within said period and thereafter diligently pursued same to completion.

(b) No waiver by Principal of any default on the part of Agent in performance of any of the terms, covenants or conditions hereof to be performed, kept or observed by Agent shall be or shall be construed to be a waiver by Principal of any other or subsequent default in performance of any of the said terms, covenants and conditions.

(c) Principal shall have the right to temporarily close to the public the Busch Gardens or any part thereof, including The Restaurant for any cause whatsoever; provided, however, that in such case Principal's obligation to pay Agent the commission established in Article V shall not cease or be in any way abated.

(d) In the event the performance of this Agreement by either party is prevented by laws, rules or regulations of any governmental body or agency, this Agreement shall terminate and no further duties shall be owing.

XI. INDEMNITY, LIABILITY AND INSURANCE

(a) Agent agrees to indemnify and hold Principal harmless from and against any and all cost or expense resulting from a claim, settlement, suit or action for personal injury (including death) or property damage suffered by any person, corporation or organization whatsoever, where such personal injury or property damage arose out of the negligent act or omission of Agent, its officer(s), agent(s), employee(s), invitee(s), contractor(s) or others doing business with it.

(b) Principal agrees to indemnify and hold Agent harmless from and against any and all cost or expense resulting from a claim, settlement, suit or action for personal injury (including death) or property damage suffered by any person, corporation or organization whatsoever, where such personal injury or property damage arose out of the negligent act or omission of

Principal, its officer(s), agent(s), employee(s), invitee(s), contractor(s) or others doing business with it.

(c) Principal shall procure and obtain for its account AND AT ITS SOLE EXPENSE such insurance coverage as necessary with Agent named as co-insured where applicable (PARAGRAPH AT 4

(d) Agent shall indemnify and hold Principal harmless from and against any and all loss, cost or expense of all claims, demands, suits or settlements arising out of or resulting from any contract entered into by Agent on behalf of Principal, where the authority to enter into such a contract is not herein conferred on Agent.

XII. CASUALTY LOSS

It is expressly understood that should The Restaurant, or any part thereof, be damaged or destroyed by any cause whatsoever, Principal has the option of rebuilding, repairing, or replacing such property as has been damaged or destroyed, or of not rebuilding or replacing same, whichever is deemed more expedient, economical or desirable by Principal, provided however, that Principal shall not be relieved of its obligation to Agent to pay the Agent's commission specified in paragraph V during the remainder of the INITIAL term hereof, OR ANY RENEWAL THEREOF.

XIII. NOTICES

All notices (including but not limited to designations, notifications and reports) given or required to be given to or by either party shall be in writing and all such notices shall be forwarded by registered or certified mail to the addresses set forth on the first page of this Agreement or to such other addresses as either party may notify the other by certified or registered mail. Notices to Principal shall be to the attention of Mr. William H. Thurman, General Manager Busch Gardens, or his successor, and notice to

Agent shall be to the attention of Mr. Sidney Sherman, President, or his successor.

XIV. ASSIGNMENT

Because Agent's services hereunder are of a unique and personal nature, Agent shall not assign, sell, convey, transfer, mortgage or pledge this Agreement. Provided, however, that should Agent elect to incorporate his business, this Agreement may be assigned to said corporation with the written approval of Principal.

XV. AMENDMENT AND INTERPRETATION

(a) This Agreement may be amended only by an instrument in writing signed by the party against whom enforcement of such amendment may be sought.

(b) This Agreement shall be governed by and interpreted in accordance with the laws of the State of Florida.

XVI. NON-WAIVER OF RIGHTS

No waiver by Principal of any default on the part of Agent in performance of any of the terms, covenants or conditions hereof to be performed, kept or observed by Agent shall be or shall be construed to be a waiver by Principal of any other or subsequent default in performance of any of the said terms, covenants and conditions.

XVII. HEADINGS

The paragraph headings, if any, are inserted herein only for convenience and for reference, and in no way define, limit or otherwise describe the scope or intent of any provision hereof.

XVIII. PRIOR APPROVAL OF SUCCESSOR

It is understood that this is a personal services agreement and that the participation of Agent is vital to both parties. Therefore, in the event that (1) Agent should become incapacitated and unable to perform the

services herein agreed, and thereby be required to hire an employee to perform in his stead, or (2) Agent should elect to sellhis enterprise to some third party, any such transfer of interest, control or functional responsibility shall be subject to the prior written approval of Principal.

XIX. AGREEMENT NOT TO COMPETE

Agent will not operate a restaurant or in any other way compete with or aid a competitor of, Principal within a radius of 20 miles of the Restaurant during the term of this agreement.

XX. SUBSEQUENT ILLEGALITY

This Agreement is conditioned upon the approval of Federal and State (Florida) liquor control authorities, and any rule or regulation of those authorities which significantly impairs this Agreement shall be cause for immediate termination of this Agreement by Principal.

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement to be duly executed the day and year first above written by a person duly authorized.

SHERMAN MANAGEMENT CORPORATION
MR. SIDNEY SHERMAN

By _____

_____
Date

ANHEUSER-BUSCH, INCORPORATED

By _____

_____
Title

_____
Date

A 559

PLAINTIFF'S EXHIBIT 36

INTER-OFFICE CORRESPONDENCE DATED AUGUST 6, 1973
FROM DENNIS P. LONG TO MR. AUGUST A. BUSCH, III

ANHEUSER-BUSCH, INC.

INTER-OFFICE CORRESPONDENCE

August 6, 1973

BEST COPY AVAILABLE

Mr. August A. Busch III

As you know, we have been pursuing the feasibility of A-B building a hotel in the Tampa Gardens...the removal of Restaurant Associates as operator of the Old Swiss House...and a takeover of the in-park food service by Corporate Affairs. These three are interrelated because:

...R.A. is a union operator and Marriott - who would run the Swiss and Hotel - is not.

...R.A. has union employees in-park, who we must remove before we takeover.

Therefore, the transition from R.A. to Marriott and Anheuser-Busch, must be well planned and coordinated...so we remove the union without affecting the Tampa Brewery.

However some problems have arisen:

1. Labor Situation

A-B's contract with R.A. expires December 26, 1973...with a 90-day notification clause...so we must notify them by September 25. However, R.A.'s agreement with the Hotel and Restaurant Employees does not expire until November 4, 1974. According to Paul Saad and Stu Meyer, our present contract with R.A. is such that we are the principal and R.A. is our agent...and as a result, we are joint employers of the union employees. Therefore, if we terminate our contract on December 26, 1973, A-B could be held liable to fulfill the unexpired eleven months of the contract...and if we or Marriott attempted to replace the union employees in the Old Swiss House or the Gardens, the union could picket the brewery.

It should be noted that the R.A. local union is weak, and typically does not employ a lawyer in its petitions to the NLRB. It is possible that the union would not understand the legal intricacies by which they could take action against A-B and picket the brewery, and that the removal of the union could be made with relative ease. Nonetheless the above possibility does exist.

2. Liquor License Transfer

The transition from a union to non-union operation also requires a distinct change in the method of doing business...so the NLRB would not rule that our sole purpose of removing R.A. (and its union) was to remove the union. This means alterations to the Swiss House, to the menu and a transfer of our liquor license.

With regard to the latter, it is the opinion of our Legal Department and T. Paine Kelly that A-B can transfer its license only under a long-term lease arrangement...in such an arrangement we would lose control and receive rent - rather than share the profits. This opinion is based on the tied house law - where a brewer cannot share in the profits from the retail sale of alcoholic beverages. The special exemption we have now does not allow us to transfer the license (and yet, as mentioned above, to effect a clean break from the union on September 25, 1973, we should transfer our license).

I do not feel that we can relinquish complete control of the Old Swiss House and/or the hotel...so we must find a way to retain the license, share the profits...and remove the union. Such labor and legal ramifications are currently under fur her study by Stu Meyer, Rich Schwartz, C. Jarrell and the Marriott lawyers.

3. Tampa Hotel

Preliminary economic studies indicate that the hotel would provide a DCFROI of close to 10%. However, the study is not yet complete because we require inputs from Marriott as to the design, capital costs, market potential...and the final operating agreement. Marriott is withholding such final input until they have consummated the Williamsburg agreement. Once they begin, their input to our efforts should take a month...so assuming they start by October 1, 1973, we could be ready to make a recommendation by December 1973. (It should be noted that our plans at present call for capital cost estimates by H. Greenblatt, F. Guyton and the Marriott design people...and not on firm bids.)

The problem here is that we will not have a firm decision on the hotel until December...after the September 25 cutoff date for R.A....and Marriott does not want the Swiss House unless there is to be a hotel.

Because of these interrelated problems of the union - license - and hotel, it will be difficult to remove R.A. and their union by September 25, 1973 and still effect our plans. This leaves us with three alternatives:

1. Scrap our present plan...remove R.A....and replace them with another union operator until we can effect a smooth transition.

2. Remove R.A. on September 25, 1973...take our chances with the union... attempt to find a solution to the license agreement before that time... and work on the assumption that the hotel is a "Go" decision.

3. Extend the contract with R.A. through November 1974 (which is when R.A.'s contract with the union expires) by which time we will have made a decision on the hotel...the principal-agent and its attendant labor problems...and we would have more time to work on a solution to the license problem.

A 561
Plaintiff's Exhibit 36

Of these choices, I prefer the third...because it provides us the best way to achieve our goals. While I realize the problems involved with the extension of less than adequate operation of the Old Swiss House, and the possibility of the need to change our overall goals, I feel that this alternative is preferable to one that insists that we take action until we have clearly defined the problem and the results.

Dennis P. Long

DPL:kw

A 562

PLAINTIFF'S EXHIBIT 38

INTER-OFFICE CORRESPONDENCE DATED APRIL 25, 1975 FROM AUGUST A. BUSCH, III TO DENNIS P. LONG

ANHEUSER-BUSCH, INC.

INTER-OFFICE CORRESPONDENCE

April 25, 1975

Mr. Dennis P. Long

Reference the attached letter from James R. Bickle dated April 23, re the proposed Old Swiss House change, and your letter dated April 25 recommending the change be made.

I concur with the logic in both memorandums and with your recommendation. Please put this item on the next Management Committee agenda so it can be acted upon by the corporation.

August A. Busch III

CC: Mr. J. L. Hayward

Encl.

Dft 2 Ep 11 38 - aeh - 2/24/76

A 563

PLAINTIFF'S EXHIBIT 40

RESTAURANT ASSOCIATES INDUSTRIES, INC. - BUSCH GARDENS
STATEMENT OF OPERATIONS, DECEMBER 29, 1974 TO JUNE 28, 1975

RESTAURANT ASSOCIATES INDUSTRIES, INC.
BUSCH GARDENS - OLD SWISS HOUSE
STATEMENT OF OPERATIONS
DECEMBER 29, 1974 TO JUNE 28, 1975

	AMOUNT	%
SALES FOOD	$ 903,384	
Sales Liquor	126,466	
Sales Other	850	
Total	1,030,700	
FOOD COST	289,019	31.9
Cost Liquor	30,334	23.9
Cost Other	40	4.7
Total	319,393	30.9
GROSS PROFIT	711,307	69.0
OPERATING EXPENSES		
Labor	249,443	24.2
Employee Benefits	56,432	5.4
Total	305,875	29.6
Supplies	27,022	2.6
Expendable Equipment	12,299	1.1
Equipment Rental	1,641	.1
Promotion Expense	2,304	.2
Maintenance & Cleaning	21,099	2.0
Club Discounts	4,166	.4
Laundry & Uniforms	22,883	2.2
Music	4,915	.4
Utilities	31,952	3.1
Flowers	224	-
Direct Miscellaneous	5,493	.5
Total	439,873	42.6
OTHER EXPENSE		
Advertising	5,938	.5
Occupancy Cost	25,714	2.4
Depreciation & Amortization	-	-
Insurance	796	-
Other Misc.	1,569	.1
Total	34,017	3.3
PROFIT FROM RESTAURANT OPERATIONS	$ 237,417	23.0

A 564

PLAINTIFF'S EXHIBIT 41

BUSCH GARDENS - OLD SWISS HOUSE ESTIMATED STATEMENT OF OPERATIONS JULY 9, 1975 TO DECEMBER 27, 1975

BUSCH GARDENS - OLD SWISS HOUSE
ESTIMATED STATEMENT OF OPERATIONS
FOR THE PERIOD JULY 9, 1975 TO DECEMBER 27, 1975

	AMOUNT	%
SALES FOOD	$662,525	
Sales Liquor	95,000	
Sales Other	3,870	
Totals	761,395	
FOOD COST	212,385	31.9
Cost Liquor	22,705	23.9
Cost Other	182	4.7
Totals	235,272	30.9
GROSS PROFIT	526,123	69.1
OPERATING EXPENSES		
Labor	184,258	24.2
Employee Benefits	41,115	5.4
Totals	225,373	29.6
Supplies	22,842	2.9
Expendable Equipment	8,375	1.1
Equipment Rental	761	.1
Promotion Expense	1,523	.2
Maintenance & Cleaning	15,989	2.0
Club Discounts	3,046	.4
Laundry & Uniforms	17,512	2.2
Music	3,046	.4
Utilities	23,603	3.1
Direct Miscellaneous	3,806	.5
Totals	325,876	42.6
PROFIT - OPERATING EXPENSE	200,247	26.3
OTHER EXPENSE		
Advertising	3,807	.5
Occupancy Cost	35,451	4.7
Insurance	-	-
Other Miscellaneous	2,284	.3
Totals	41,542	5.5
PROFIT FROM RESTAURANT OPERATIONS	$158,705	20.8

A 565

DECISION-OPINION, POLLACK, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RESTAURANT ASSOCIATES INDUSTRIES, INC.,

Plaintiff,

v.

ANHEUSER-BUSCH, INC.,

Defendant,

and

SIDNEY SHERMAN and SHERMAN MANAGEMENT CORP. as additional defendants because they are or may be needed for an adjudication pursuant to FRCP 19.

FILED
NOV 23 1976
D. OF N.

75 Civ. 3018(MP)

DECISION

APPEARANCES:

DORNBUSH MENSCH MANDELSTAM & SCHWARTZ
Attorneys for Plaintiff
22 East 40th Street
New York, N.Y. 10016
By: Richard J. Schaeffer, Esq.

WILKIE, FARR & GALLAGHER
Attorneys for Defendant
One Chase Manhattan Plaza
New York, N.Y. 10005
By: Paula J. Mueller, Esq. and
Robert T. Kucel, Esq.

MILTON POLLACK, District Judge.

Milton Pollack, District Judge.

This diversity case was tried to the Court without a jury. Plaintiff, claiming breach of contract and unlawful enticement of a key employee, sought damages and injunctive and declaratory relief.

The plaintiff had for some years operated the food and beverage facilities of the Old Swiss House in Busch Gardens, Tampa, Florida, a unique tourist attraction owned by the corporate defendant. The corporate defendant terminated the relationship as of July 9, 1975 and took over the operation of those facilities, hiring the employee (Sidney Sherman) who had been plaintiff's general manager for operations at Busch Gardens to manage Old Swiss House on its behalf.

The background has been set out in the Court's opinion denying a preliminary injunction. Restaurant Associates Industries, Inc. v. Anheuser-Busch, Inc., 397 F.Supp. 1213 (S.D.N.Y. 1975). Most of the significant facts were agreed to by the parties in the pretrial order herein. These will be deemd incorporated hereby. The basis disputes tried to the Court were whether there was

an existing contract between the parties at the time the corporate defendant elected to take over and manage the operation itself, and whether Sherman was free to receive and accept the corporate defendant's offer of employment which was effective upon the termination of plaintiff's right to manage Old Swiss House.

For the reasons detailed hereafter, the plaintiff is not entitled to any relief herein.

Applicable Law

In this diversity action, the law of the forum state, including its choice of law rules, must be applied. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). New York's conflicts rules provide that contracting parties may choose the state law by which their agreement is to be governed as long as the state whose law is chosen has a reasonable connection with the controversy. A.S. Rampell, Inc. v. Hyster Co., 3 N.Y.2d 369, 382, 165 N.Y.S.2d 475, 486 (1957).

The Management Agreement under which the parties operated provides that it shall be governed by the laws

of Florida, the state in which the Agreement was performed. Consequently, Florida law is to be applied to plaintiff's breach of contract claim.

Florida law is also applicable to plaintiff's unlawful enticement claim since Florida is the jurisdiction with the most significant contacts with the issue. See Babock v. Jackson, 12 N.Y.2d 473 (1963). Florida courts, however, have not addressed many of the legal issues raised in the present lawsuit. The parties have cited cases from various jurisdictions as indicative of the decisions Florida courts would be likely to reach, and this Court has proceeded on that basis.

The Breach of Contract Claim

Restaurant Associates Industries, Inc. (Associates, or plaintiff, hereafter) began operating the food and beverage facilities at Busch Gardens for Anheuser-Busch, Inc. (Busch, or defendant, hereafter) in late 1969. The parties subsequently entered into a formal Management Agreement for a term to end December 25, 1973. The Management Agreement contained a clause (Paragraph 4(b)) providing for automatic annual renewal unless either party gave written notice of termination at least 90 days before the expiration of the initial or some additional term.

The Management Agreement was the last written agreement entered into by the parties. Busch sent written notice of termination of this agreement on September 24, 1973 to Associates. However, Associates continued to manage Old Swiss House until the relationship was terminated as of July 9, 1975 pursuant to notice given May 27, 1975.

Resolution of plaintiff's breach of contract claim depends solely on whether the letter sent by Busch on September 24, 1973 terminated the Management Agreement at the end of its initial term.[1/] The evidence establishes that the term contract was ended in 1973 and that the arrangement thereafter was only one of an agency at will.

The text of the 1973 Busch letter terminating the written contract stated:

1/ Busch has not suggested that it gave any other notice that would have precluded automatic annual renewal of the contract through December 25, 1975. Associates has not disputed that if the contract was not automatically renewed at the end of its initial term, then the subsequent relationship of the parties was at will and terminable upon reasonable notice.

> Please be advised that Anheuser-Busch, Incorporated, desires to renegotiate certain terms of the management agreement which is scheduled to terminate December 25, 1973. This notice is being sent in compliance with the requirements of Paragraph 4(b) of the Management Agreement.
>
> I have asked Mr. James R. Bickle [Busch's director of merchandising] to contract you shortly in an effort to conclude negotiations with representatives of your company as soon as possible.

The Busch letter gave Associates sufficiently clear and unequivocal notice that the Management Agreement would not be automatically renewed and would thus terminate at the end of the initial term. It explicitly stated that it was being sent as notice "in compliance with the requirements of Paragraph 4(b) of the Management Agreement," i.e., the paragraph providing for automatic renewal unless notice of termination were given. The letter noted that the Agreement was scheduled to terminate on December 25, 1973, and that Busch wished to renegotiate its terms. Busch's expression of its desire to renegotiate does not alter the fact that the letter was sufficient to put Associates on notice that there would not be an automatic renewal.

The Busch vice president who wrote the letter testified that it was his intention in sending the missive to terminate the contract with Associates. Busch's director of merchandising testified that it was his understanding that after December 25, 1973 there was no contractual agreement in force and that Associates continued to operate Old Swiss House pursuant only to an "ongoing understanding." The parties engaged in extensive negotiations after December 25, 1973 aimed at achieving a new contract, in the course of which they apparently negotiated and implemented oral agreements controlling the on-going relationship. The Management Agreement had provided that amendments thereto could be accomplished only by a signed writing. The informal oral agreements reached in the negotiations after the termination were inconsistent with substantive provisions of the Management Agreement, a circumstance supporting the absence of a renewal of the term contract.

Associates contends that the Busch letter which it admittedly received within the usual time for mail delivery (three days) was nonetheless ineffective to terminate the contract between the parties because it was sent by regular

mail, not by registered or certified mail as specified in the Management Agreement. Associates made no objection at the time to the form of the posting and the point lacks merit. An argument identical to that advanced by Associates was rejected in Barbier v. Barry, 345 S.W.2d 557 (Tex. Ct. Civ. App. 1961), which held that if such a letter was in fact received the failure to send it by registered or certified mail does not destroy its effectiveness as notice.[2/]

Associates also asserts that the September 24, 1973 letter was ineffective because it was addressed to Restaurant Associates, Inc., instead of Restaurant Associates Industries, Inc., the name used in the Management Agreement. However, the letter was addressed to the corporate officer of Associates specified in the Management Agreement and was mailed to the proper street address and it was duly received by the party for whom

---

2/ Phillips v. Kastens, 188 N.Y.S. 121 (App. T. 1921), relied on by Associates, is distinguishable. In that case the intended recipient of a letter purporting to be notice of termination of a contract, sent via ordinary mail, denied ever having received the letter.

it was intended. This minor misstatement of Associates' corporate name did not destroy the letter's effectiveness as notice.

Associates claims further that the September 24, 1973 letter was ineffective to terminate the Management Agreement because although it was mailed 91 days before the December 25, 1973 expiration date, it was not received until 88 days before that date. The Agreement, however, provided not that notice should be received but that notice should be given not less than 90 days prior to the expiration date. There is no indication that the parties intended time of receipt to be of the essence. To the contrary, the Management Agreement provided that letters sent via registered or certified mail should be deemed effective as of the date of the mailing thereof. It would be unrealistic to view the 1973 letter to have been too late when no such thought crossed the mind of Associates until this litigation and no prejudice resulted from the alleged delay. See Music, Inc. v. Henry B. Klein

Co., 213 Pa. Super. 182, 245 A.2d 650 (1968).[3/]

Accordingly, the Court holds that the Management Agreement was terminated as of December 25, 1973. After that date the relationship between the pa ties was solely at will, terminable upon reasonable notice. Associates makes no claim that the notice of termination given May 27, 1975 was unreasonable, so Busch is not liable to Associates for terminating its right to manage Old Swiss House as of July 9, 1975.

The Unlawful Enticement Claim

Associates claims that Busch, by negotiating with and offering employment to its employee, Sidney Sherman, induced him to breach a fiduciary duty to Associates. An alternative formulation used by Associates is that Busch tortiously interfered with the business relation between Sherman and Associates, and thereby breached its own fiduciary obligation to Associates. Associates has failed to prove that Busch's conduct was actionable under any theory.

3/ But see State ex rel. Hall v. Camper, 347 A.2d 137 (Del. Super. Ct. 1975). Camper rejected the Music holding, calling it "not the majority position." However, all of the cases relied on in the Camper opinion involved statutory, rather than contractual, notice provisions; and none contained a clause indicating that time was not considered of the essence.

Sherman began working for Associates in 1965 and was made general manager for operations at Busch Gardens on January 1, 1974 at a salary of $26,000 a year. He retained that position until July 9, 1975 when Associates ceased operating Old Swiss House. Sherman's duties while in the employ of Associates included overall responsibility for and supervision of all activities engaged in by Associates at Busch Gardens.

Sherman's relationship with Associates was always as an employee at will. He never was a corporate officer or director of Associates.

In January 1975, when negotiations for a new contract with Associates seemed to be foundering, Busch commenced discussions with Sherman concerning his leaving Associates to manage Old Swiss House for Busch. Busch's director of merchandising informed Sherman that Associates had not yet signed a contract proposed by Busch and that if the parties could not come to an agreement Busch would have to make arrangements for a successor. Sherman expressed hope that Busch could come to an agreement with Associates and continue to operate Old Swiss House with Associates as the

agent and Sherman as their employee, but indicated that if this did not eventuate he would be interested in being considered as a successor to Associates.

In May 1975 Sherman was told that Busch had decided to terminate its relationship with Associates, that they would like him to assume management of Old Swiss House, and that if he did not take the job it surely would not go to Associates. Sherman had told both Associates and Busch that he did not wish to leave Tampa and intended to continue living in that area.

Sherman accepted Busch's offer of employment and formed a personal corporation, Sherman Management Corp., which was employed to manage Old Swiss House from July 9, 1975 on. Associates was not advised of the negotiations between Busch and Sherman until after the employment contract was entered into by them.

It is true that where a third party deals with an agent knowing that the agent is acting in violation of his fiduciary duty to his principal, the third party is jointly liable with the agent for damages occasioned to the principal. Martin Co. v. Commercial Chemists, Inc.,

213 So. 2d 477 (Fla. Dist. Ct. App. 1968). However, Associates has not shown that its agent Sherman violated any fiduciary duty owing to it.

That Sherman negotiated with Busch for an employment to replace Associates at Old Swiss House was not a breach of any fiduciary obligation he owed to Associates. An agent may, before termination of his employment, make arrangements to later compete with the principal as to matters for which he had been employed. Restatement (Second) of Agency § 393, comment (e) (1958), followed in, e.g., United Aircraft Corp. v. Boreen, 413 F.2d 694 (3d Cir. 1969). See also Connelly v. Special Road & Bridge Dist. No. 5, 99 Fla. 456 (1930). Nor was Sherman's failure to disclose his negotiations with Busch a breach of a fiduciary duty. National Rejectors, Inc. v. Trieman, 409 S.W. 2d 1 (Mo. 1966); Cudahy Co. v. American Laboratories, Inc. 313 F.Supp. 1339 (D. Neb. 1970).

Associates argues that Sherman's conduct was in violation of a fiduciary obligation because he aided Busch in its plan to place itself in a favorable position for the termination of Associates' agency for the purpose of destroying Associates' business. The evidence,

however, does not establish any improper motives on the part of Sherman or Busch. Compare Town & Country House & Home Service, Inc. v. Newbery, 3 N.Y.2d 554 (1958) with Duane Jones Co. v. Burke, 306 N.Y. 172, 117 N.E.2d 237 (1954), and A.S. Rampell, Inc. v. Hyster Co., 3 N.Y.2d 369, 165 N.Y.S.2d 475, 482 (1957). There was no purpose on the part either of Sherman or Busch to injure or destroy the business or agency of Associates.

This is not a case in which an agent procured for himself a contract that might just as easily have been procured for his employer. Sherman agreed to work for Busch only after learning that Busch had resolved to end its relationship with Associates.

In Anker v. Dobbs, 57 So. 2d 432 (Fla. 1952), the Florida Supreme Court refused to find liability under similar circumstances. The Florida court affirmed the dismissal of a complaint alleging breach of fiduciary duty by a franchisee's employees who had contracted with the franchise to replace their employer as franchisee. Noting that the defendants had made no effort to secure the contract until learning that their employer's franchise was in danger of being taken from him, the Court held that

the employer had failed to carry the burden of proving that the defendants had induced the cancellation of his franchise. Associates has similarly failed to prove that either Busch or Sherman induced the cancellation of Associates' agency in this case.

Associates does not improve its position by characterizing its cause of action as one for interference with its business relation with Sherman. The basic rule is that a competitor 4/ is privileged to induce the termination of a contract between an employer and his employee where the contract is terminable at will.

4/ Busch may be deemed a competitor of Associates in the sense that both parties were involved in the operation of a restaurant and both parties needed employees skilled in that business. See National Oil Co. v. Phillips Petroleum Co., 265 F.Supp. 320, 328-30 (W.D. Wis. 1966) (Oil company and its jobber treated as competitors); Restatement (Second) of Torts § 768, comment (c) (Tent. Draft No. 14, 1969).

Moreover, the privilege to induce a third person, bound only by a contract terminable at will, not to continue a business relation with another is not limited to competitors. See Restatement (Second) of Torts §§ 766, comment (a), and 767 (Tent. Draft No. 14, 1969).

Prosser, Law of Torts § 129 at 946 (4th ed. 1971); Restatement (Second) of Torts § 768, Note to Institute (2) (Tent. Draft No. 14, 1969), followed in, e.g. Anchor Alloys, Inc. v. Non-Ferrous Processing Corp., 39 A.D.2d 504, 336 N.Y.S.2d 944 (1972) (inducement of employee at will to move to a competitor will not give rise to liability unless the purpose was solely to produce damage or the means employed were unfair); Republic Systems & Programming, Inc. v. Computer Assistance, Inc., 322 F.Supp. 619 (D. Conn. 1970), aff'd per curiam, 440 F.2d 996 (2d Cir. 1971). See also Frank Coulson, Inc.-Buick v. General Motors Corp., 488 F.2d 202, 206 (5th Cir. 1974); International Expositions, Inc. v. Miami Beach, 274 So. 2d 29 (Fla. Dist. Ct. App. 1973).

The Prosser-Restatement privilege reflects the policies enunciated in two Learned Hand opinions:

> So far as we have found, it has never been thought actionable to take away another's employee, when the defendant wants to use him in his own business, however much the plaintiff may suffer. It is difficult to see how servants could get the full value of their services on any other terms; time creates no prescriptive right in other men's labor. If an employer expects so much, he must secure it by contract.
> Harley & Lund Corp. v. Murray Rubber Co., 31 F.2d 932, 934 (2d Cir.), cert. denied, 279 U.S. 872 (1929).

> Nobody has ever thought, so far as we can find, that in the absence of some monopolistic purpose every one has not the right to offer better terms to another's employe[e], so long as the latter is free to leave. The result of the contrary would be intolerable, both to such employers as could use the employe[e] more effectively and to such employe[e]s as might receive added pay. It would put an end to any kind of competition. Triangle Film Corp. v. Artcraft Pictures Corp., 250 F. 981, 982 (2d Cir. 1918).

The privilege may be defeated if the actor employs improper means or evinces improper motivation. However, in the present case Busch's conduct was unmarked by fraud or coercion and there is no evidence of a purpose to cripple Associates.

Associates seeks to avoid application of the Prosser - Restatement rule by claiming that Busch stood in a "relation of confidence" to it. The privilege to induce an employee to discontinue a business relation has been held unavailable where a violation of confidence existed between the actor and the former employer. A.S. Rampell, Inc. v. Hyster Co., 3 N.Y. 2d 369, 165 N.Y.S.2d 475 (1957).

Associates, however, has not proved the requisite relation of confidence between itself and Busch.

Joseph Kayata, Associates' vice president and chief accounting officer, testified that on an overall basis Associates' business was not dominated by Busch. The evidence does not establish Associates' economic dependency on Busch. The mere fact that Associates had a contractual relationship with and performed services for Busch does not render the Prosser - Restatement privilege inapplicable. See National Oil Co. v. Phillips Petroleum Co., 265 F.Supp. 320, 328-30 (W.D. Wis. 1966) (privilege applied where oil company solicited key employees of its jobber).

Moreover, Associates has not proved that, as was alleged in Rampell, Busch's real purpose was to appropriate the staff and goodwill of Associates. Consequently, Busch is not liable to Associates for its dealings with Sherman. Neither Sherman nor Sherman Management Corp. was served with process in this case and, at all events, there is no basis for imposing any liability on either of them and the plaintiff is not entitled to any relief as to them.

Accordingly, judgment is directed to be entered in favor of the defendants and against plaintiff, dismissing the entire amended complaint, with costs.

The foregoing shall constitute the findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a).

SO ORDERED.

Milton Pollack
U.S. District Judge

November 23rd. 1976

A 584

JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RESTAURANT ASSOCIATES INDUSTRIES, INC. Plaintiff	:	75 Civil 3018 (MP)
-against-	:	
ANHEUSER-BUSCH, INC., and SIDNEY SHERMAN and SHERMAN MANAGEMENT CORP., as additional defendants because they are or may be needed for an adjudication pursuant to FRCP 19 Defendants	:	JUDGMENT

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Milton Pollack, United States District Judge, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter on November 23, 1976, having handed down its opinion, constituting its findings of fact and conclusions of law, and the Court having directed that judgment be entered in favor of defendants, it is,

ORDERED, ADJUDGED and DECREED: That defendants ANHEUSER-BUSCH, INC., and SIDNEY SHERMAN and SHERMAN MANAGEMENT CORP., have judgment against plaintiff RESTAURANT ASSOCIATES INDUSTRIES, INC., dismissing the entire amended complaint, with costs to be taxed.

Dated: New York, N.Y.
November 24, 1976

Raymond F. Burghardt
Clerk

~~Due and timely~~ Service of ONE copies of the within APPENDIX is hereby admitted this 4TH day of APRIL 197

Wilson Sonsini

Attorneys for APPELLEE

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Plaintiff's Exhibit 4

EXHIBIT B

	MONTH OF	YEAR TO DATE

EXHIBIT B

	MONTH OF	YEAR TO DATE
Sales		
Food		
Beverage		
Tobacco		
Total		
Cost of Sales		
Food		
Beverage		
Tobacco		
Total		
Gross Profit		
Other Income		
Total Income		
Operating Expenses		
Payroll (wages, salaries and commissions)		
F.I.C.A., S.U.I., F.U.I., Workmen's Compensation, etc.		
Employee Fringe Benefits		
Employee Meals		
Music and Entertainment		
Repairs and Replacements		
Laundry and Linen Service		
China, Glassware, Silverware, Utensils		
Cleaning and Cleaning Supplies		
Paper and Guest Supplies		
Sales Promotion		
Advertising		
Customer Expense		
Utilities		
Telephone		
Office Supplies - Postage, etc.		
Armored Car Service		
Credit Card Service Charges		
Bad Debts		
Dues and Subscriptions		
Miscellaneous expenses		
Total Operating Expenses		
Net Profit